Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

SEUNG CHUN LIM, FLUFFY, INC., a California corporation, and 5436 SANTA MONICA BOULEVARD, INC., a California corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an adult business claims that an adult zoning ordinance deprives them of a reasonable opportunity to relocate within a city, does the city bear the burden of proof that there is a sufficient number of alternative sites available for these adult businesses to relocate?

2. In determining whether there are sufficient alternative sites for adult businesses to relocate, is property encumbered by a long-term lease part of the relevant real estate market within the meaning of this court's decision of *City of Renton v. Playtime Theatres*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)?

3. If more alternative locations are available than the number of adult businesses which demand them, has a city provided a constitutionally sufficient number of sites?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	3
Reasons for Granting the Writ	7
I. This Court Should Review The Holding Of The Ninth Circuit That Cities Have The Burden Of Proving That There Is A Sufficient Number Of Alternative Sites Available For Adult Businesses To Relocate.	7
A. The Courts Of Appeals Are In Direct Conflict Over The Question Of Whether A City Has The Burden Of Proving That There Is A Sufficient Number Of Sites Available For Adult Businesses To Relocate.	7

Contents

Page

II. This Court Should Review The Holding Of The Ninth Circuit That Properties Encumbered By A Long-Term Lease Are Not Part Of The Relevant Real Estate Market For Adult Businesses To Relocate. 9

A. The Decision Of The Court Of Appeals Conflicts With Decisions Of The Supreme Court, With Other Courts Of Appeals And With Prior Decisions Of The Ninth Circuit. 9

III. This Court Should Review The Holding Of The Ninth Circuit That It Is Unable To Determine If There Are Sufficient Alternative Sites For Plaintiffs To Relocate Their Adult Business. 12

A. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeals And With Prior Decisions Of The Ninth Circuit. 12

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

BBI Enterprises, Inc. v. City of Chicago, 874 F. Supp. 890 (N.D. Ill. 1995) 8

City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) .... i, 9, 10, 11

Lakeland Lounge, Inc. v. City of Jackson, 973 F.2d 1255 (5th Cir. 1992) 12

SDJ, Inc. v. City of Houston, 636 F. Supp. 1359 (S.D. Tex. 1986), *aff'd*, 837 F.2d 1268 (5th Cir. 1988) 8

3750 East Foothill Blvd., Inc. v. City of Pasadena, 912 F. Supp. 1257 (C.D. Cal. 1995), *aff'd*, 99 F.3d 1147 (9th Cir. 1996) 10

T-Marc, Inc. v. Pinellas County 804 F. Supp. 1500 (M.D. Fla. 1992) 8

Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993) 4, 5, 10, 11, 12, 13

Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995) 7, 10, 11, 12

Cited Authorities

	Page
United States Constitution:	
First Amendment	1, 2
Fourteenth Amendment	1, 2
Statutes:	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	2
Other Authorities:	
Long Beach Municipal Code, § 21.15.110	3
Long Beach Municipal Code, § 21.27.150	3
Long Beach Municipal Code, § 21.45.110(A)(1)	4

TABLE OF APPENDICES

Page

Appendix A — Order Amending Opinion And Denying Rehearing And Amended Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed June 27, 2000 And Amended August 23, 2000 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed June 27, 2000 ..... 13a

Appendix C — Findings Of Fact And Conclusions Of Law And Order Dissolving Preliminary Injunction And Directing Entry Of Judgment And Judgment Of The United States District Court For The Central District Of California Dated And Filed May 15, 1998 ..... 24a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000). The district court opinion (App. C) is reported at *Lim v. City of Long Beach*, 12 F. Supp. 1050 (C.D. Cal. 1998).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on June 27, 2000 (App. B).

A petition for rehearing and suggestion for rehearing en banc was timely filed. In an order dated August 23, 2000, the Court of Appeals entered an order amending the June 27, 2000 opinion and denied the petition for rehearing (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> Section 1983. Civil Action for Deprivation of Rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, and Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This action involves a challenge to the City of Long Beach's adult entertainment ordinance by the owners of three adult book stores and the owner of an adult bookstore/ mini-theater, on the grounds that such ordinance is unconstitutional.

Although this action arises from the recent expiration of the City's amortization period for non-conforming adult entertainment businesses, the City has had a long history of regulation of such uses. In 1977, the City of Long Beach adopted an adult entertainment ordinance, which made certain adult businesses located near each other or near residential districts, churches or schools non-conforming uses. "Adult entertainment businesses" are defined in Long Beach Municipal Code, § 21.15.110. This ordinance was adopted upon the receipt of testimony regarding the deleterious effect of these uses in such locations and in concentrated areas.

In 1988, eleven years after the adoption of the ordinance, the City undertook a review in order to determine how successful its adult entertainment ordinance had been in eliminating such uses from the specified undesirable areas. The City of Long Beach found that its 1977 adult entertainment ordinance had little effect, and the City Council adopted Long Beach Municipal Code, § 21.27.150, which required all the existing non-conforming adult entertainment businesses to comply with the locational requirements within two years. The ordinance provided that if certain conditions were met, the owners of such businesses could obtain a three-year extension to the amortization period ending on August 1, 1993.

After the United States Court of Appeals for the Ninth Circuit ruling in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), the City of Long Beach revisited its adult entertainment ordinance. On August 18, 1994 and September 1, 1994, the City's Planning Commission held hearings on several proposed amendments to the adult entertainment ordinance, and planning commission staff prepared reports for these hearings. The purpose of these amendments was to reduce the size of several of the buffer zones, thereby making the locational requirements for adult businesses less restrictive. On September 20, 1994, and October 11, 1994, the Planning Commission filed reports with the City Council recommending modifications of the buffer zones for adult businesses. On October 18, 1994, the City Council adopted Ordinance C-7274 (the "1994 Ordinance").

The 1994 Ordinance modified, among other things, the adult entertainment buffer zones and established an eighteen-month amortization period (through May 18, 1996) for existing non-conforming businesses to comply with the less restrictive locational requirements.

Under Long Beach Municipal Code, § 21.45.110(A)(1), as amended in 1994, an adult entertainment business may not be located: (1) within 300 feet of a residential zoning district or residential planned development district within the City (specifically excluding mixed-use zones); (2) within 1,000 feet of any public or private school (kindergarten through twelfth grade) located within the City; (3) within 600 feet of any City park; (4) within 500 feet of a church; (5) within 1,000 feet of any other adult entertainment business.

None of the plaintiffs have made any legitimate effort to relocate their adult entertainment businesses prior to or after the filing of this lawsuit. Robert Blake, the president of Fluffy, Inc., testified that he has not attempted to relocate because the City of Long Beach "hasn't proven to [him] that [he has to]." Larry Sphar, principal officer of 5436 Santa Monica Boulevard, Inc., allegedly contacted realtors and potential lessors. Mr. Sphar considered purchasing a building on Cherry Avenue, near the 405 freeway, but because the seller wanted $1.3 million dollars for the building, Mr. Sphar felt that this purchase would not be "a good, ethical business decision."

The City of Long Beach identified 115 potentially available alternative sites for adult entertainment establishments. These locations do not constitute the total market for alternative sites that could be potentially used for adult business establishments. The City of Long Beach did not attempt to identify every possible alternative location due to the cost of such a survey. The sites identified by the City of Long Beach represent an attempt by the City of Long Beach to show the existence of sufficient alternative locations available to plaintiffs and other adult businesses.

After a non-jury trial, Judge Paez of the United States District Court for the Central District of California found 109 of the sites identified by the City of Long Beach met the criteria set forth under *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532 (9th Cir. 1993) and that at least twenty-seven or twenty-eight adult businesses could co-exist under the City of Long Beach's 1994 ordinance. Plaintiffs conceded during the trial that eight sites were available for the plaintiffs to relocate, and seven of these sites are more than 1,000 feet from each other.

Plaintiffs appealed, contending among other things that the district court erred in placing the burden of proof on the adult business owners and that the court erred in considering sites encumbered by long-term leases to be part of the relevant real estate market.

On June 27, 2000, the Ninth Circuit issued an opinion in which it ruled that the City of Long Beach had the burden of proving that adult businesses had a reasonable opportunity to open and operate within the City. The Ninth Circuit also ruled that this action should be remanded to permit plaintiffs' adult businesses the opportunity to present evidence that properties proffered by the City of Long Beach were not reasonably available because they were encumbered by long-term leases.

Two of plaintiffs' businesses are located on Pacific Coast Highway between Hayes and Termino Avenue, where there has been an ongoing problem with prostitution and lewd activities, and plaintiffs' adult entertainment businesses are clearly contributing to these illegal activities. In addition, one of plaintiffs' businesses is a problem with over fifty (50) arrests for lewd conduct occurring in or around plaintiff's building in a two year period. Mr. Sphar, the operator of this establishment, acknowledged that he was aware of these arrests, but did not see this as a problem because he did not consider these arrest to be "legitimate."

Plaintiffs have been allowed, under order of the Federal Court, to continue to operate in close proximity to residential neighborhoods without any restriction. Plaintiffs' adult businesses have had and continue to have a deleterious effect on residents and neighborhoods in the City of Long Beach.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD REVIEW THE HOLDING OF THE NINTH CIRCUIT THAT CITIES HAVE THE BURDEN OF PROVING THAT THERE IS A SUFFICIENT NUMBER OF ALTERNATIVE SITES AVAILABLE FOR ADULT BUSINESSES TO RELOCATE.

A. The Courts Of Appeals Are In Direct Conflict Over The Question Of Whether A City Has The Burden Of Proving That There Is A Sufficient Number Of Sites Available For Adult Businesses To Relocate.

Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995), falls on all fours with the case before this court. In *Woodall*, the Fifth Circuit Court of Appeals addressed the issue of who has the burden of proof, and the Court ruled that it was the plaintiff adult business owner who has the burden of proof. The Court stated as follows:

> The Adult Businesses had the burden of proving that the Ordinances denied them a reasonable opportunity to open and operate their businesses by failing to provide reasonable alternative avenues of communication. To meet their burden, the Adult Businesses had to show that the areas left open to them were inadequate to satisfy the demand for adult business locations.

(*Id.* at 1126.)

In *BBI Enterprises, Inc. v. City of Chicago*, 874 F. Supp. 890 (N.D. Ill. 1995), the district court ruled that plaintiff BBI had the burden of proving its constitutional challenge. In pointing out that both parties' proofs had deficiencies, the district court stated "where as here neither side has supplied entirely reliable information, the party having the burden of persuasion — here BBI — must suffer the consequences of such uncertainty." (*Id.* at 895.)

In *T-Marc, Inc. v. Pinellas County* 804 F. Supp. 1500 (M.D. Fla. 1992), the district court held that the law does not require defendants to confirm that the sites are economically and logistically viable, except as it relates in terms of the ordinance. (*Id.* at 1504.) The *T-Marc* court had determined that the County had met its burden of complying with the ordinance "by presenting evidence that 123 alternative sites complied with the distance restriction in the ordinance." (*Id.* at 1504, following *SDJ, Inc. v. City of Houston*, 636 F. Supp. 1359, 1370 (S.D. Tex. 1986), *aff'd*, 837 F.2d 1268 (5th Cir. 1988).)

In the present case, defendant City of Long Beach has come forward with a significant number of sites. Plaintiffs, however, found these sites to be unsatisfactory for a variety of reasons. (*i.e.*, the site is too large, the site is too small, the site will have to be remodeled, the site may be occupied, the site is too expensive, etc.)

In the present case, there is no evidence that plaintiffs have been unable to relocate. In fact, the plaintiffs have made little attempt to find a location that met the required buffers. Mr. Blake of South Seas Adult Bookstore acknowledged that he did not make any attempt to relocate. Mr. Sphar testified that he found a location, but deemed this cite to be

too expensive to buy. Also, Angels Topless Bar is operating within the buffer requirements.

II.

THIS COURT SHOULD REVIEW THE HOLDING OF THE NINTH CIRCUIT THAT PROPERTIES ENCUMBERED BY A LONG-TERM LEASE ARE NOT PART OF THE RELEVANT REAL ESTATE MARKET FOR ADULT BUSINESSES TO RELOCATE.

A. The Decision Of The Court Of Appeals Conflicts With Decisions Of The Supreme Court, With Other Courts Of Appeals And With Prior Decisions Of The Ninth Circuit.

The court of appeals' decision ignores the United States Supreme Court's landmark decision of *City of Renton v. Playtime Theatres*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). In *Renton*, respondents, adult business operators, argued that the locational requirements of the city's ordinance resulted in a substantial restriction of their first amendment right of speech because almost all of the land in question "is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and that in general there are no 'commercially viable' adult theater sites within the 520 acres left open by the *Renton* ordinance." (*Id.*, 475 U.S. at 53). The United States Supreme Court explained that the Ninth Circuit had erred in accepting plaintiffs' argument and stated the following:

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give

> rise to a First Amendment violation . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.

(*Id.*, 475 U.S. at 54.)

Following *Renton*, the Fifth Circuit found it "patently irrelevant" that certain sites were unavailable either because the owner of the site would not rent or sell to an adult business or because the site is currently occupied. (*Woodall v. City of El Paso*, 49 F.3d 1120, 1125-26 (5th Cir. 1995).) The *Woodall* Court concluded that neither of these facts were "of any obvious concern under *Renton*." (*Id.*)

In discussing the "ground rules" for determining whether adequate alternative sites exist for adult businesses, District Court Judge Collins of the Central District of California determined that it was "not particularly relevant" under *Renton* that almost none of the developed land was for sale or lease and that commercially viable sites were lacking. (*3750 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1257, 1264 (C.D. Cal. 1995), *aff'd*, 99 F.3d 1147 (9th Cir. 1996) ("*3570 East Foothill I*").

Even properties with a restrictive lease banning adult businesses are considered "potentially available" because the United States Supreme Court has declined to carve out special rules for adult businesses competing in the real estate market. (*See Renton, supra*, 475 U.S. at 53; *Topanga, supra*, 989 F.2d at 1531-32 ("The issue is whether any site is part of an actual market for commercial enterprises generally . . .

The City is correct that at times Mr. Bailey improperly considered factors such as . . . whether adult businesses would not be welcomed by landlords.")

United States District Court Judge Paez correctly ruled in the trial of *Lim v. City of Long Beach* that under *Renton* and *Topanga*, it is immaterial that a site is encumbered by a long-term lease. The district court recognized that the United States Supreme Court has refused to carve out special rules for adult entertainment businesses competing in the real estate market. (*See Lim v. City of Long Beach*, 12 F. Supp. 2d 1050 (C.D. Cal. 1998).)

As set forth in *Renton*, *Topanga* and *Woodall*, sites encumbered by long-term leases are part of the actual real estate market, and the court of appeals should have refused to carve out special rules for adult businesses competing in the real estate market.

The court of appeals' decision in the present case erroneously asserts that sites encumbered by long-term leases may not potentially become available under the *Topanga* criteria. The decision to carve out this special rule for adult businesses competing in the real estate market is without justification and inconsistent with the court of appeals acknowledging the fact that sites encumbered by restrictive leases banning adult entertainment are part of the actual business real estate market.

Renton, *Topanga* and *Woodall*, makes it clear that sites encumbered by long-term leases and sites encumbered by restrictive leases banning adult entertainment should be considered part of the actual business real estate market. The decision below ignores the fact that an operator of an adult

business may, like any other business, purchase the property in question, renegotiate or buy-out a long-term lease, or negotiate to sublease the property that is subject to a long-term lease. Contrary to the court of appeals' decision, a site encumbered by a long-term lease should be considered part of the actual real estate market as required under *Topanga*.

To require a city to enact a zoning ordinance which would be impacted daily by the existence or non-existence of private long-term leases upon the sites would create an impossible burden and financial hardship upon the City of Long Beach. This requirement would have a far reaching impact upon all cities ability to effectively create zoning by requiring each city to enact zoning regulations based upon and subject to negotiable private lease terms rather than commercial, industrial, or residential location and use.

III.

THIS COURT SHOULD REVIEW THE HOLDING OF THE NINTH CIRCUIT THAT IT IS UNABLE TO DETERMINE IF THERE ARE SUFFICIENT ALTERNATIVE SITES FOR PLAINTIFFS TO RELOCATE THEIR ADULT BUSINESS.

A. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeals And With Prior Decisions Of The Ninth Circuit.

Two courts have held that if more sites are available than the number of businesses which demand them, the number of sites is not unreasonable. (*Lakeland Lounge, Inc. v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992); *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995).) Likewise,

in *Topanga*, the Court appeared to agree with this reasoning when it stated that "at first glance the 120 sites deemed practically available . . . would appear to be constitutionally sufficient, given that there are only 102 adult businesses now in operation in the City of Los Angeles." (*Id.* at 1533.)

Plaintiffs' adult businesses concede that there are eight locations available for their adult businesses to relocate and that seven of these locations are over a thousand feet from each other. Clearly, there are adequate relocation sights for plaintiffs' adult businesses, even if the court wishes to ignore the remaining hundred locations the City of Long Beach has identified.

CONCLUSION

For all of the foregoing reasons, Petitioner City of Long Beach respectfully request that its petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JUNE 27, 2000 AND AMENDED AUGUST 23, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-55915
D.C. No. CV-96-02742-RAP

SEUNG CHUN LIM; FLUFFY, INC., a California Corporation; 5436 SANTA MONICA BOULEVARD, INC., a California Corporation,

Plaintiffs-Appellants,

v.

CITY OF LONG BEACH, a municipal corporation,

Defendant-Appellee.

ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Argued and Submitted
February 8, 2000 — Pasadena, California

Appendix A

Filed June 27, 2000
Amended August 23, 2000

Before: Robert Boochever, Michael Daly Hawkins, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Hawkins

* * *

ORDER

The Opinion filed on June 27, 2000, slip op. 6933, and appearing at 2000 WL 821295 (9th Cir. June 27, 2000), is amended as follows:

At slip op. 6938, in the fourth sentence of the first full paragraph, substitute "Plaintiff 5436 Santa Monica Boulevard owns one adult business (a combination mini theater and bookstore) which is within 300 feet of a residential district." for "Plaintiff 5436 Santa Monica Boulevard owns two adult businesses which are within 300 feet of residential districts."

With this amendment, the panel has voted unanimously to deny Defendant-Appellee's petition for rehearing. Judge Boochever recommends rejection of the suggestion for rehearing en banc, and Judges Hawkins and Thomas vote to reject the en banc suggestion.

The full court has been advised of the suggestion for rehearing en banc and no active Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appendix A

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Plaintiffs-Appellants' Petition for Rehearing is also DENIED.

OPINION

The owners of three adult book and video stores and an adult mini-theater (collectively "Plaintiffs") sued the City of Long Beach ("Long Beach") challenging the constitutionality of a Long Beach zoning ordinance restricting the locations in which adult businesses can operate. The district court found that the ordinance did not violate the Plaintiffs' rights under the First Amendment or the Equal Protection Clause. We remand to allow Plaintiffs to develop and present evidence concerning the availability of alternative commercial locations in the Long Beach real-estate market.

BACKGROUND

In 1994, Long Beach amended its existing adult entertainment zoning ordinance[1] by modifying the locational restrictions on adult businesses. The new ordinance provided that an adult entertainment business[2] may not be located

1. Long Beach began zoning adult businesses in 1977. *See Lim v. City of Long Beach*, 12 F. Supp. 2d 1050, 1053-54 (C.D. Cal. 1998).

2. The ordinance also defines adult entertainment businesses. *See Lim*, 12 F. Supp. 2d at 1054. There is no question here that the Plaintiffs qualify as adult businesses under the ordinance.

within (1) 300 feet of a residential zoning district or a residential planned development district; (2) 1,000 feet of any public or private school; (3) 600 feet of any city park; (4) 500 feet of a church; or (5) 1,000 feet of any other adult entertainment business. *See* Long Beach Municipal Code ("LBMC") § 21.45.110(A)(1). The ordinance further provided that an adult entertainment business may not be located in certain specific areas of Long Beach. *See* LBMC § 21.45.110(A)(1)(f). The ordinance established an eighteen-month amortization period for existing adult businesses, LBMC § 21.45.300, but otherwise equally treated existing and new adult businesses.

Plaintiff Seung Chun Lim owns two adult businesses in Long Beach, both of which are in violation of the ordinance because they are within 300 feet of residential districts. One of his businesses is also located within an area restricted under LBMC § 21.45.110(A)(1)(f). Plaintiff Fluffy, Inc. owns one adult bookstore in Long Beach which is within 300 feet of a residential district and within a restricted area. Plaintiff 5436 Santa Monica Boulevard owns one adult business (a combination mini theater and bookstore) which is within 300 feet of a residential district.

Plaintiffs filed this suit seeking a permanent injunction against enforcement of the ordinance, claiming that the ordinance violates their First Amendment rights as well as the Equal Protection Clause.

The district court found the ordinance constitutional. Where an ordinance does not ban adult businesses outright, but limits the areas of a city in which they may operate, it is

considered a content-neutral time, place, and manner restriction. *See City of Renton v. Playtime Theaters*, 475 U.S. 41, 46 (1986). The ordinance is constitutional so long as it is designed to serve substantial governmental interests and allows for alternative avenues of communication. *See id.* The parties do not dispute that curbing the secondary effects of adult businesses is a substantial governmental interest. *See City of Erie v. Pap's A.M.*, No. 98-1161, 529 U.S. __ (2000) (statute is content neutral where government's interest is to curb secondary effects of adult businesses). Therefore, the only question presented to the district court, and in this appeal, is whether Long Beach's ordinance unreasonably limits alternative avenues of communication.

During discovery, Long Beach identified 115 sites that it contended were available for use by adult businesses. It provided specific and detailed information about each site. Long Beach also noted that these 115 sites did not represent every site that was potentially available to adult businesses; rather, the 115 locations were an attempt by Long Beach to show the existence of a sufficient number of alternative sites. *See Lim*, 12 F. Supp. 2d at 1062.

The district court found that 27 or 28 adult businesses could coexist under the ordinance and concluded that the ordinance allowed for alternative avenues of communication. *See id.* at 1065-67. The district court also concluded that the ordinance did not violate the Equal Protection Clause because Long Beach had a rational basis for treating adult businesses differently from other businesses. *See id.* at 1067-68.

Appendix A

STANDARD OF REVIEW

The district court's findings of fact are reviewed for clear error, *see Valley Eng'rs, Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir. 1998), while its conclusions of law are reviewed de novo, *see Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998). Mixed questions of law and fact are also reviewed de novo. *See United States v. City of Spokane*, 918 F.2d 84, 86 (9th Cir. 1990). A mixed question of law and fact exists when there is no dispute as to the facts, the rule of law is undisputed, and the question is whether the facts satisfy the legal rule. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982); *United States v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998).

ALTERNATIVE AVENUES OF COMMUNICATION

As a threshold matter, we note that it is clear that the burden of proving alternative avenues of communication rests on Long Beach.[3] *See J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998) ("[T]he government bears the burden of justifying (i.e. both the burden of production and persuasion) the challenged statute."); *Phillips v. Borough of Keyport*, 107 F.3d 164, 177 (3d Cir. 1997) (en banc) (burden of proving alternative avenues of communication is element for state to satisfy); *see also Renton*, 475 U.S. at 50 (implicitly placing burden of proof on city); *Acorn Investments v. City of Seattle*, 887 F.2d 219, 224 (9th Cir. 1989) (city has burden to establish

3. The district court erred to the extent that it placed this burden on the Plaintiffs. *See Lim*, 12 F. Supp. 2d 1064-65.

substantial government interest). Traditionally and logically, this burden is placed on Long Beach because the party seeking to restrict protected speech has the burden of justifying that restriction. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983) (in context of commercial speech).[4] The issue before this court — one that is decidedly less clear — is the level of specificity about each particular site Long Beach is required to provide to sustain its burden.

A city allows for alternative avenues of communication if it offers adult businesses a "reasonable opportunity to open and operate . . . within the city." *Renton*, 475 U.S. at 54. We have applied a two-step approach to determining whether this condition is satisfied: (1) relocation sites provided to adult businesses must be considered part of an actual business real estate market for commercial enterprises generally; and (2) after excluding those sites that may not properly be considered part of the relevant real estate market, there are an adequate number of relocation sites. *See Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993).

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4. In general, where a plaintiff claims suppression of speech under the First Amendment, the plaintiff bears the initial burden of proving that speech was restricted by the governmental action in question. *See, e.g., Los Angeles Police Department v. United Reporting Publishing Co.*, 120 S. Ct. 483, 488-89 (1999). The burden then shifts to the defendant governmental entity to prove that the restriction in question is constitutional. *See, e.g., Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923, 1930 (1999).

Appendix A

A. Actual Business Real Estate Market

In *Topanga Press*, we noted that "[w]e are left to the simple, yet slippery, test of reasonableness when attempting to discern whether land is or is not part of a market in which any business may compete." 989 F.2d at 1530. We then listed five considerations in making the reasonableness determination: (1) a relocation site is not part of the market if it is "unreasonable to believe that it would ever become available to any commercial enterprise;" (2) a relocation site in a manufacturing or industrial zone that is "reasonably accessible to the general public" may also be part of the market; (3) a site in a manufacturing zone that has proper infrastructure may be included in the market; (4) a site must be reasonable for some generic commercial enterprise, although not every particular enterprise, before it can be considered part of the market; and (5) a site that is commercially zoned is part of the relevant market. *See id.* at 1531. In addition, a site must obviously satisfy the conditions of the zoning ordinance in question. *See id.*

Plaintiffs argue that the district court erred in considering sites with restrictive leases banning adult entertainment establishments. Under *Topanga Press*, however, sites must only reasonably become available to some generic commercial enterprise, not specifically to adult businesses. *See* 989 F.2d at 1531-32 ("The issue is whether any site is part of an actual market for commercial enterprises generally."); *cf. Woodall v. City of El Paso (Woodall III)*, 49 F.3d 1120, 1125-26 (5th Cir. 1995) (also noting that large single-use buildings, like warehouses and factories, may arguably be outside commercial real estate market). Here,

these sites may be available to commercial enterprises other than adult entertainment businesses. Therefore, the district court did not err in considering this property part of the actual business real estate market.

Plaintiffs also argue that the district court improperly considered certain currently occupied property as part of the actual business real estate market. *Topanga Press* stated that the requirement that property potentially become available (the first factor, above) "connotes genuine possibility." 989 F.2d at 1531. Thus, for example, property subject to a long-term lease might not meet the *Topanga Press* test. *Id.* Plaintiffs contend that under *Topanga Press*, Long Beach should have been required to prove that the currently occupied property would reasonably become available to any commercial enterprise. Long Beach came forward with a list of 115 sites it contended were potentially available. According to the district court opinion, 12 F. Supp. 2d at 1056-62, Long Beach provided pertinent, specific and detailed information about each site. Based on this information, the district court found that Long Beach made a good faith and reasonable attempt to prove that it was providing the Plaintiffs with a reasonable opportunity to open and operate.

A city cannot merely point to a random assortment of properties and simply assert that they are reasonably available to adult businesses. The city's duty to demonstrate the availability of properties is defined, at a bare minimum, by reasonableness and good faith. If a plaintiff can show that a city's attempt is not in fact in good faith or reasonable, by, for example, showing that a representative sample of

properties are on their face unavailable, then the city will be required to put forth more detailed evidence. But where a city has provided a good faith and reasonable list of potentially available properties, it is for the Plaintiffs to show that, in fact, certain sites would not reasonably become available. *See also Hickerson v. New York City*, 146 F.3d 99, 107 (2d Cir. 1998) ("[W]e are aware of no federal case . . . that requires municipalities to identify the exact locations to which adult businesses may relocate, as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are 'physically and legally available' to accommodate the adult establishments."). There is no reason to conclude that Long Beach acted in bad faith or unreasonably in identifying potentially available properties. The burden of showing that particular sites would not reasonably become available therefore rests with the Plaintiffs.

The district court denied Plaintiffs' request to submit additional evidence to satisfy their burden. *See Lim*, 12 F. Supp. 2d at 1065 n.6. The district court held that such evidence was irrelevant under *Renton* and *Topanga Press*. This holding was error in light of our conclusion today that, under *Topanga Press*, property must have a genuine possibility of coming available for commercial use to be considered part of the relevant commercial real estate market. We therefore remand to permit Plaintiffs to develop and present evidence that Long Beach's proffered properties would not reasonably become available because, for example, they were encumbered by long-term leases.

B. Sufficiency of Alternative Sites

Once the relevant market has been properly defined in light of any additional evidence presented by Plaintiffs on remand, the district court will have to reexamine whether the market contains a sufficient number of potential relocation sites for Plaintiffs' adult businesses. Because it is unclear how many sites will be part of the relevant market, we cannot determine whether the district court correctly concluded that a sufficient number of sites exist to allow Plaintiffs a reasonable opportunity to open and operate.

EQUAL PROTECTION

Plaintiffs also claim that Long Beach violated their equal protection rights by (1) forcing existing adult businesses to relocate under the ordinance while allowing non-adult businesses to remain in place even when in violation of other city zoning ordinances; and (2) forcing adult businesses to comply with new parking regulations while non-adult businesses are exempt. Plaintiffs argue that Long Beach's actions single out adult businesses for unfavorable treatment in violation of the Equal Protection Clause of the Fourteenth Amendment.[5]

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5. Plaintiffs' argument is different from the argument raised in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976), where the plaintiffs argued that their equal protection rights were violated because the ordinances in question treated adult businesses differently from other businesses. Here, Plaintiffs claim that Long Beach violates their equal protection rights by enforcing the 1994 ordinance against adult businesses while failing to enforce other zoning ordinances that affect non-adult businesses.

It is unclear whether the Plaintiffs have even established that Long Beach only forced non-conforming adult businesses to relocate, and only forced adult businesses to comply with new parking regulations. Even assuming Plaintiffs adequately proved that Long Beach discriminated against adult businesses, however, Plaintiffs' arguments fail.

Where no suspect classification is under scrutiny, the Equal Protection Clause requires that a government's action be rationally related to a permissible government objective. *See, e.g., Massachusetts Board of Retirement v. Maine*, 427 U.S. 307 (1976). This test has traditionally proved deferential toward the governmental entity. *See, e.g., Railway Express Agency v. New York*, 336 U.S. 106 (1949).

Here, there is evidence that Long Beach had a rational reason for enforcing its adult business ordinance and not enforcing other zoning ordinances. Long Beach enforces its adult business ordinance because of its interest in curbing the secondary effects of adult businesses. Long Beach does not have a similar interest in enforcing its other ordinances. As such, the district court did not err in denying Plaintiffs' equal protection claim.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED. Costs on appeal to Plaintiffs.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JUNE 27, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-55915
D.C. No. CV-96-02742-RAP

SEUNG CHUN LIM; FLUFFY, INC., a California Corporation; 5436 SANTA MONICA BOULEVARD, INC., a California Corporation,

Plaintiffs-Appellants,

v.

CITY OF LONG BEACH, a municipal corporation,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Argued and Submitted
February 8, 2000 — Pasadena, California

Filed June 27, 2000

Appendix B

Before: Robert Boochever, Michael Daly Hawkins, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Hawkins

* * *

OPINION

HAWKINS, Circuit Judge:

The owners of three adult book and video stores and an adult mini-theater (collectively "Plaintiffs") sued the City of Long Beach ("Long Beach") challenging the constitutionality of a Long Beach zoning ordinance restricting the locations in which adult businesses can operate. The district court found that the ordinance did not violate the Plaintiffs' rights under the First Amendment or the Equal Protection Clause. We remand to allow Plaintiffs to develop and present evidence concerning the availability of alternative commercial locations in the Long Beach real-estate market.

BACKGROUND

In 1994, Long Beach amended its existing adult entertainment zoning ordinance[1] by modifying the locational restrictions on adult businesses. The new ordinance provided that an adult entertainment business[2] may not be located

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1. Long Beach began zoning adult businesses in 1977. *See Lim v. City of Long Beach*, 12 F. Supp. 2d 1050, 1053-54 (C.D. Cal. 1998).

2. The ordinance also defines adult entertainment businesses. *See Lim*, 12 F. Supp. 2d at 1054. There is no question here that the Plaintiffs qualify as adult businesses under the ordinance.

within (1) 300 feet of a residential zoning district or a residential planned development district; (2) 1,000 feet of any public or private school; (3) 600 feet of any city park; (4) 500 feet of a church; or (5) 1,000 feet of any other adult entertainment business. *See* Long Beach Municipal Code ("LBMC") § 21.45.110(A)(1). The ordinance further provided that an adult entertainment business may not be located in certain specific areas of Long Beach. *See* LBMC § 21.45.110(A)(1)(f). The ordinance established an eighteen-month amortization period for existing adult businesses, LBMC § 21.45.300, but otherwise equally treated existing and new adult businesses.

Plaintiff Seung Chun Lim owns two adult businesses in Long Beach, both of which are in violation of the ordinance because they are within 300 feet of residential districts. One of his businesses is also located within an area restricted under LBMC § 21.45.110(A)(1)(f). Plaintiff Fluffy, Inc. owns one adult bookstore in Long Beach which is within 300 feet of a residential district and within a restricted area. Plaintiff 5436 Santa Monica Boulevard owns two adult businesses which are within 300 feet of residential districts.

Plaintiffs filed this suit seeking a permanent injunction against enforcement of the ordinance, claiming that the ordinance violates their First Amendment rights as well as the Equal Protection Clause.

The district court found the ordinance constitutional. Where an ordinance does not ban adult businesses outright, but limits the areas of a city in which they may operate, it is considered a content-neutral time, place, and manner

restriction. *See City of Renton v. Playtime Theatres*, 475 U.S. 41, 46 (1986). The ordinance is constitutional so long as it is designed to serve substantial governmental interests and allows for alternative avenues of communication. *See id.* The parties do not dispute that curbing the secondary effects of adult businesses is a substantial governmental interest. *See City of Erie v. Pap's A.M.*, No. 98-1161, 529 U.S. __ (2000) (statute is content neutral where government's interest is to curb secondary effects of adult businesses). Therefore, the only question presented to the district court, and in this appeal, is whether Long Beach's ordinance unreasonably limits alternative avenues of communication.

During discovery, Long Beach identified 115 sites that it contended were available for use by adult businesses. It provided specific and detailed information about each site. Long Beach also noted that these 115 sites did not represent every site that was potentially available to adult businesses; rather, the 115 locations were an attempt by Long Beach to show the existence of a sufficient number of alternative sites. *See Lim*, 12 F. Supp. 2d at 1062.

The district court found that 27 or 28 adult businesses could coexist under the ordinance and concluded that the ordinance allowed for alternative avenues of communication. *See id.* at 1065-67. The district court also concluded that the ordinance did not violate the Equal Protection Clause because Long Beach had a rational basis for treating adult businesses differently from other businesses. *See id.* at 1067-68.

Appendix B

STANDARD OF REVIEW

The district court's findings of fact are reviewed for clear error, *see Valley Eng'rs Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir. 1998), while its conclusions of law are reviewed de novo, *see Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998). Mixed questions of law and fact are also reviewed de novo. *See United States v. City of Spokane*, 918 F.2d 84, 86 (9th Cir. 1990). A mixed question of law and fact exists when there is no dispute as to the facts, the rule of law is undisputed, and the question is whether the facts satisfy the legal rule. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982); *United States v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998).

ALTERNATIVE AVENUES OF COMMUNICATION

As a threshold matter, we note that it is clear that the burden of proving alternative avenues of communication rests on Long Beach.[3] *See J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998) ("[T]he government bears the burden of justifying (i.e. both the burden of production and persuasion) the challenged statute."); *Phillips v. Borough of Keyport*, 107 F.3d 164, 177 (3d Cir. 1997) (en banc) (burden of proving alternative avenues of communication is element for state to satisfy); *see also Renton*, 475 U.S. at 50 (implicitly placing burden of proof on city); *Acorn Investments v. City of Seattle*,

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3. The district court erred to the extent that it placed this burden on the Plaintiffs. *See Lim*, 12 F. Supp. 2d at 1064-65.

887 F.2d 219, 224 (9th Cir. 1989) (city has burden to establish substantial government interest). Traditionally and logically, this burden is placed on Long Beach because the party seeking to restrict protected speech has the burden of justifying that restriction. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983) (in context of commercial speech).[4] The issue before this court — one that is decidedly less clear — is the level of specificity about each particular site Long Beach is required to provide to sustain its burden.

A city allows for alternative avenues of communication if it offers adult businesses a "reasonable opportunity to open and operate . . . within the city." *Renton*, 475 U.S. at 54. We have applied a two-step approach to determining whether this condition is satisfied: (1) relocation sites provided to adult businesses must be considered part of an actual business real estate market for commercial enterprises generally; and (2) after excluding those sites that may not properly be considered part of the relevant real estate market, there are an adequate number of relocation sites. *See Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993).

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4. In general, where a plaintiff claims suppression of speech under the First Amendment, the plaintiff bears the initial burden of proving that speech was restricted by the governmental action in question. *See, e.g., Los Angeles Police Department v. United Reporting Publishing Corp.*, 120 S. Ct. 483, 488-89 (1999). The burden then shifts to the defendant governmental entity to prove that the restriction in question is constitutional. *See, e.g., Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923, 1930 (1999).

Appendix B

A. Actual Business Real Estate Market

In *Topanga Press*, we noted that "[w]e are left to the simple, yet slippery, test of reasonableness when attempting to discern whether land is or is not part of a market in which any business may compete." 989 F.2d at 1530. We then listed five considerations in making the reasonableness determination: (1) a relocation site is not part of the market if it is "unreasonable to believe that it would ever become available to any commercial enterprise;" (2) a relocation site in a manufacturing or industrial zone that is "reasonably accessible to the general public" may also be part of the market; (3) a site in a manufacturing zone that has proper infrastructure may be included in the market; (4) a site must be reasonable for some generic commercial enterprise, although not every particular enterprise, before it can be considered part of the market; and (5) a site that is commercially zoned is part of the relevant market. *See id.* at 1531. In addition, a site must obviously satisfy the conditions of the zoning ordinance in question. *See id.*

Plaintiffs argue that the district court erred in considering sites with restrictive leases banning adult entertainment establishments. Under *Topanga Press*, however, sites must only reasonably become available to some generic commercial enterprise, not specifically to adult businesses. *See* 989 F.2d at 1531-32 ("The issue is whether any site is part of an actual market for commercial enterprises generally."); *cf. Woodall v. City of El Paso (Woodall III)*, 49 F.3d 1120, 1125-26 (5th Cir. 1995) (also noting that large single-use buildings, like warehouses and factories, may arguably be outside commercial real estate market). Here,

these sites may be available to commercial enterprises other than adult entertainment businesses. Therefore, the district court did not err in considering this property part of the actual business real estate market.

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A city cannot merely point to a random assortment of properties and simply assert that they are reasonably available to adult businesses. The city's duty to demonstrate the availability of properties is defined, at a bare minimum, by reasonableness and good faith. If a plaintiff can show that a city's attempt is not in fact in good faith or reasonable, by, for example, showing that a representative sample of

properties are on their face unavailable, then the city will be required to put forth more detailed evidence. But where a city has provided a good faith and reasonable list of potentially available properties, it is for the Plaintiffs to show that, in fact, certain sites would not reasonably become available. *See also Hickerson v. New York City*, 146 F.3d 99, 107 (2d Cir. 1998) ("[W]e are aware of no federal case . . . that requires municipalities to identify the exact locations to which adult businesses may relocate, as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are 'physically and legally available' to accommodate the adult establishments."). There is no reason to conclude that Long Beach acted in bad faith or unreasonably in identifying potentially available properties. The burden of showing that particular sites would not reasonably become available therefore rests with the Plaintiffs.

The district court denied Plaintiffs' request to submit additional evidence to satisfy their burden. *See Lim*, 12 F. Supp. 2d at 1065 n.6. The district court held that such evidence was irrelevant under *Renton* and *Topanga Press*. This holding was error in light of our conclusion today that, under *Topanga Press*, property must have a genuine possibility of coming available for commercial use to be considered part of the relevant commercial real estate market. We therefore remand to permit Plaintiffs to develop and present evidence that Long Beach's proffered properties would not reasonably become available because, for example, they were encumbered by long-term leases.

Appendix B

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Plaintiffs also claim that Long Beach violated their equal protection rights by (1) forcing existing adult businesses to relocate under the ordinance while allowing non-adult businesses to remain in place even when in violation of other city zoning ordinances; and (2) forcing adult businesses to comply with new parking regulations while non-adult businesses are exempt. Plaintiffs argue that Long Beach's actions single out adult businesses for unfavorable treatment in violation of the Equal Protection Clause of the Fourteenth Amendment.[5]

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5. Plaintiffs' argument is different from the argument raised in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), where the plaintiffs argued that their equal protection rights were violated because the ordinances in question treated adult businesses differently from other businesses. Here, Plaintiffs claim that Long Beach violates their equal protection rights by enforcing the 1994 ordinance against adult businesses while failing to enforce other zoning ordinances that affect non-adult businesses.

Appendix B

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Where no suspect classification is under scrutiny, the Equal Protection Clause requires that a government's action be rationally related to a permissible government objective. *See, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). This test has traditionally proved deferential toward the governmental entity. *See, e.g., Railway Express Agency v. New York*, 336 U.S. 106 (1949).

Here, there is evidence that Long Beach had a rational reason for enforcing its adult business ordinance and not enforcing other zoning ordinances. Long Beach enforces its adult business ordinance because of its interest in curbing the secondary effects of adult businesses. Long Beach does not have a similar interest in enforcing its other ordinances. As such, the district court did not err in denying Plaintiffs' equal protection claim.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED. Costs on appeal to Plaintiffs.

APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DISSOLVING PRELIMINARY INJUNCTION AND DIRECTING ENTRY OF JUDGMENT AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED MAY 15, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 96-2742 RAP (RMBx)

SEUNG CHUN LIM, FLUFFY, INC.,
5436 SANTA MONICA BOULEVARD, INC.,

Plaintiffs,

v.

CITY OF LONG BEACH,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DISSOLVING PRELIMINARY INJUNCTION AND DIRECTING ENTRY OF JUDGMENT

I.

Introduction

Plaintiffs own and operate three adult book and video stores and a mini-theater in the City of Long Beach

(the "City") On October 18, 1994, the City enacted an Ordinance regulating the location of adult entertainment establishments (the "1994 Ordinance") Plaintiffs assert First Amendment and Equal Protection challenges to the application of the 1994 Ordinance to their businesses. Plaintiffs allege that the 1994 Ordinance as applied to them violates the First Amendment because it impermissibly limits the number of alternative channels of communication for exercise of their free speech rights. Plaintiffs also contend that the Ordinance denies them the equal protection of the law because it forces nonconforming adult business to relocate or cease operating their businesses, while other nonconforming but non-adult businesses are permitted to remain indefinitely.

Having carefully considered all the evidence admitted at trial and the parties' post-trial briefs, proposed findings of fact and conclusions of law, and post-trial oral arguments, the Court now makes the following findings of fact and conclusions of law and orders entry of judgment for the City.

In making its findings, the Court first sets forth the history of the 1994 Ordinance, factual details regarding each of the plaintiffs and a brief review of prior litigation among the parties. Thereafter, the Court sets forth its findings with respect to each of the potentially available alternative sites for use as an adult business. Ultimately, the Court concludes that the 1994 Ordinance as applied to plaintiffs provides a sufficient number of alternative locations for expression to satisfy the First Amendment. The Court further concludes that the 1994 Ordinance does not deny plaintiffs the equal protection of the law. Accordingly, judgment shall be entered

in favor of the City dismissing this action on the merits and vacating the stipulated preliminary injunction entered by the Court.

II.

Findings of Fact

A. *The 1977 Ordinance*

1. On September 15, 1977 and October 6, 1977, the Planning Commission of the City of Long Beach held several hearings regarding the adoption of an "adult entertainment" ordinance that would restrict the location of new adult entertainment businesses.

2. As part of its deliberations, the Planning Commission considered a 1977 study by the City of Los Angeles regarding the deleterious effects of the concentration in particular areas of adult entertainment establishments.

3. Following its review of the proposed ordinance, the Planning Commission recommended to the Long Beach City Council that it adopt an adult entertainment zoning ordinance restricting the location of such businesses. The City Council enacted such an ordinance in 1977 ("the 1977 Ordinance"). The 1977 Ordinance was codified in §§ 21.15.110 and 21.45.110 of the Long Beach Municipal Code ("LBMC").

4. "Section 21.15.110 define[d] adult entertainment uses to include bookstores, hotels, theaters, night clubs, massage parlors, sexual encounter centers and model studios which

exhibite[d] specified anatomical areas or specified sexual activities. LBMC § 21.45.110 provide[d] that such adult entertainment uses may not be located within (1) 500 feet of any area zoned for residential use; (2) 1,000 feet of any other adult entertainment business; and (3) 1,000 feet of any public or private school, park, playground, public building, church, any noncommercial establishment operated by a bonafide religious organization, or any establishment likely to be used my minors." Exhibit 208 at 1. LBMC § 21.45.110 also provided standards for a variance procedure whereby property and business owners could seek relief from the locational requirements.

5. The 1977 Ordinance only applied to *new* adult entertainment uses; it left the then-existing adult entertainment businesses unaffected.

6. In applying the locational requirements of LBMC § 21.45.110, the City does not consider the existing uses of property located in adjoining cities.

7. The locational restrictions of LBMC § 21.45.110 as applied to city parks are limited to the "city parks" identified by the City of Long Beach's Parks and Recreation Department. *See* Exhibit 224. The traffic circle, marinas, and golf courses are not city parks.

B. *The 1988 Ordinance*

8. In 1988, the City's Planning Department undertook a study and evaluation of the 1977 Ordinance to determine whether the locational restrictions on adult entertainment

businesses had the effect of eliminating such businesses from the buffer areas established by the 1977 Ordinance. The Planning Department found that the existing ordinance had no effect upon the location of adult entertainment businesses. After holding public hearings, the Planning Commission ultimately recommended to the City Council that it amend the 1977 adult entertainment ordinance to require all existing nonconforming adult establishments to comply with the locational requirements or cease conducting business. Subsequently, the City Council adopted Ordinance C-6533, codified at LBMC § 21.27.150 (the "1988 Ordinance"), which required all *existing* nonconforming adult entertainment businesses to comply with the locational requirements within two years. The 1988 Ordinance further provided that if certain conditions were met, the owners of such businesses could obtain a three year extension of the amortization period ending on August 1, 1993.

C. *The 1994 Ordinance*

9. On August 18, 1994 and September 1, 1994, the Planning Commission held hearings on several proposed amendments to the adult entertainment ordinance. The purpose of these amendments was to reduce the size of several of the buffer zones, thereby making the locational requirements for adult businesses less restrictive.

10. On September 20, 1994 and October 11, 1994, the Planning Commission filed several reports with the City Council recommending modifications in the buffer zones and allowing a three year amortization period for nonconforming businesses to comply with the amended ordinance.

Appendix C

11. On October 18, 1994, the City Council adopted Ordinance C-7274 (the "1994 Ordinance"). *See* Exhibit 213. The 1994 Ordinance modified the adult entertainment buffer zones, required compliance with the City's parking requirements, and established an eighteen month amortization period (through May 18, 1996) for existing nonconforming businesses to comply with the less restrictive locational requirements. LBMC § 21.27.150. In adopting the 1994 Ordinance, the City Council relied upon studies from other cities including Garden Grove, California; Minneapolis, Minnesota; St. Paul, Minnesota; Indianapolis, Indiana; and Phoenix, Arizona.

12. LBMC § 21.15.110, as amended in 1994, defines adult business entertainment to include: (1) "adult bookstores" having twenty percent or more of their stock in trade in books, magazines and other periodicals, video tapes or other similar materials on display or available for sale or viewing on the premises which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas; (2) "adult mini-motion picture theater" having the capacity for less than fifty persons, and which is used for presenting, on a regular and substantial basis, material distinguished or characterized by an emphasis on matter depicting or relating to specified sexual activities or specified anatomical areas for observation by patrons in the facility; and (3) "adult motion picture arcade" where the public is permitted or invited and where coin or slug-operated or electronically or mechanically controlled still or motion picture machines, projectors or other image-producing devices are maintained to show images on a regular and

substantial basis, where the images so displayed are distinguished or characterized by an emphasis on depicting or describing specific sexual activities or specified anatomical areas.

13. Under LBMC § 21.45.110(A)(1), as amended in 1994, an adult entertainment business may not be located (1) within 300 feet of a residential zoning district or residential planned development district within the City (specifically excluding mixed-use zones); (2) within one thousand feet of any public or private school (kindergarten through twelfth grade) located within the City; (3) within 600 feet of any City park; (4) within 500 feet of a church; (5) within 1000 feet of any other adult entertainment business. Exhibit 213 at 8.

14. LBMC § 21.45.110(A)(1)(f) further provides that an adult entertainment business may not be located in the following areas:

> Fronting upon that portion of Pacific Coast Highway between Hayes and Termino Avenue, that portion of Anaheim Street between the Long Beach Freeway and Termino Avenue, that portion of Santa Fe Avenue between Anaheim Street and Pacific Coast Highway and that portion of Artesia Boulevard between Paramount Boulevard and Downey Avenue, and that portion of Broadway between Atlantic Avenue and Euclid Avenue. Such areas have been determined by the Long Beach Police Department to experience a high rate of arrests for prostitution, lewd behavior and

disorderly conduct. Such determination shall be reviewed in three (3) year intervals, commencing upon October 1, 1997.

15. LBMC § 21.45.110, as amended in 1994, also provides that "adult entertainment businesses shall comply with the parking requirements set forth in Chapter 21.41 (off-street parking and loading requirements). The number of parking spaces provided shall be the equivalent to that required for new construction, regardless of the status of the legal nonconforming parking rights of the previous use." Exhibit 213 at 9.

16. LBMC § 21.52.201(A), which governs conditional use permits for alcoholic beverage sales uses, provides that "[t]he operator of this use shall provide parking for the use equivalent to the parking required for new construction regardless of the status of the previous use as to legal nonconforming rights." Exhibit 218 at Z-303.

17. LBMC § 21.45.300, which establishes an amortization period for nonconforming open storage and uses, provides: "all open commercial uses not specifically permitted by this Chapter shall be prohibited on the effective date of the ordinance codified in this section as an amendment to the zoning regulations and all legal nonconforming open uses." Exhibit 218 at Z-248a.

18. LBMC § 21.44.400, which governs the elimination of nonconforming on-premises signs, provides that a nonconforming sign shall be removed or brought into compliance with the requirements of Chapter 21.44 within

one year of the effective date of a new owner's or lessee's business license. Exhibit 218 at Z-273.

D. *Plaintiffs*

19. Plaintiff Seung Chun Lim owns two businesses defined by LBMC 21.15.110(A)(C) as adult bookstores and adult motion picture arcades. These two bookstores are located at 1529 West Pacific Coast Highway ("Pacific World") and 6037-39 Atlantic Avenue ("T & C World").

20. The Pacific World Bookstore operated by Mr. Lim occupies 1,500 square feet. Mr. Lim sells adult books, and four video arcade machines are available to customers. T & C World Bookstore is similar to the Pacific World Bookstore. There is no evidence that Mr. Lim made any attempt to relocate either bookstore prior to or after plaintiff filed this lawsuit.

21. Plaintiff Fluffy, Inc. is a California corporation that owns the South Seas Adult Bookstore located at 1567 West Pacific Coast Highway. Its business is defined as an adult bookstore by LBMC § 21.15.110(A).

22. Robert Blake is the President of Fluffy, Inc. He testified that the South Seas Adult Bookstore has been located at 1567 West Pacific Coast Highway for twelve years. The present location consists of approximately 1,200 square feet. The bookstore sells adult books, video tapes and novelty items. Several adult video arcade machines are located in the store.

23. Although Mr. Blake consulted with a real estate agent regarding the availability of other locations for the bookstore and hired experts in connection with this litigation, he has not made any attempt to relocate the bookstore. Mr. Blake testified that he has not attempted to relocate because the City of Long Beach has yet to prove that he must move to a new location.

24. Plaintiff 5436 Santa Monica Boulevard, Inc. is a corporation that owns the Front Door Adult Theater and Bookstore at 5832-34 North Atlantic Boulevard. It, too, is an adult business as defined by LBMC §§ 21.15.110(a) and (b).

25. Larry Sphar is the principal officer of 5436 Santa Monica Boulevard, Inc., which owns the Front Door Adult Theater and Bookstore. This adult business consists of a mini-theater and bookstore. It occupies approximately 3,000 square feet. Mr. Sphar has looked for other suitable locations for his adult business but has not found what he considers to be a reasonable alternative site. He has contacted realtors and potential lessors regarding the availability of suitable alternative locations. He considered purchasing a building on Cherry Avenue, near the 405 Freeway, but he rejected this location because the seller wanted $1.3 million dollars for the building. According to Mr. Sphar, this option would not have been "a good business decision."

26. All of plaintiffs' businesses are located within 300 feet of a residential district.

27. Two of plaintiffs' businesses are located in the area described in § 21.45.110(A)(1)(f). Pacific World is located

near the 1500 block of West Pacific Coast Highway, and South Seas Adult Bookstore is located near the 1500 block of West Pacific Coast Highway.

28. From 1994 to 1996, the Long Beach Police Department made over fifty arrests for lewd conduct at or near the Front Door Theater and Bookstore.

29. Under the provisions of the 1988 adult business ordinance, plaintiffs were required to cease operating their adult businesses no later than August 1, 1990. However, plaintiffs applied for and were granted extensions permitting them to continue as adult entertainment businesses at their existing locations until August 1, 1993.

E. *Prior Litigation*

30. Because plaintiffs were required to cease operation of their adult businesses at their present locations by August 1, 1993, they filed a civil rights action on July 30, 1993, in the United States District Court for the Central District of California, entitled *Seung Chun Lim, Fluffy, Inc., a California corporation, and 5436 Santa Monica Boulevard, Inc., v. City of Long Beach*, Civil 93-4530 MRP (Tx).

31. In response to plaintiffs' motion for a preliminary injunction, the City voluntarily refrained from enforcing the 1988 Ordinance pending trial.

32. While the previous lawsuit was pending, the City, in November, 1994, amended the 1988 Ordinance as described above. Thereafter, on November 29, 1994, the

district court dismissed the earlier case without prejudice to plaintiffs' rights to challenge the constitutionality of the 1994 Ordinance in a new lawsuit. On April 17, 1996, just thirty-one days before the expiration of the amortization period under the 1994 Ordinance, plaintiffs filed the present action. On May 6, 1996, the City stipulated to the entry of a preliminary injunction. As a result of the preliminary injunction, plaintiffs have continued to operate their adult businesses at their existing locations.

F. *Potentially Available Alternative Sites*

33. The following commercial and industrial[1] sites, listed by Los Angeles County Assessor's Parcel number, were identified by the City as available for adult entertainment uses within the City of Long Beach.

34. *North Long Beach Area*

a. 7075-1-1. Lot Size: .65± acres. Zoning: Commercial. This lot consists of a small commercial center with seven units. In January, 1997, two units were vacant.

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1. Under LBMC Title 21 § 21.15.560, " 'commercial' means a category of uses characterized by the exchange of goods and services for financial or other consideration." And under LBMC § 21.15.1460, " 'industrial' means a category of land uses comprised of these activities necessary to convert natural resources into finished products. These activities include all resource extracting, resource processing, manufacturing, assembling, storage, transhipping and wholesaling that precede the arrival of goods at a retail land use." *See* Exhibit 218.

b. 7075-1-918. Lot Size: 65± acres. Zoning: General Industrial.[2] This property is occupied by a former Navy Hospital. In September 1997, the existing building was being renovated for use as a multi-tenant commercial center. As of September 18, 1997, the building was not available for occupancy.

c. 7113-1-16. Lot Size: 10± acres. Zoning: General Industrial. This property is occupied by a lumber yard and truck storage center.

d. 7113-1-18. Lot Size: 23,050± square feet. Zoning: General Industrial. This lot is occupied by an industrial supply business.

e. 7113-1-25. Lot Size: 1.6 acres. Zoning: General Industrial. This property is occupied by an industrial building/commercial enterprise.

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2. Chapter 21.33.020 of the LBMC defines industrial districts as follows: A "Light Industrial" district "allows a wide range of industries whose primary operations occur entirely within enclosed structures and which pose limited potential for environmental impacts on neighboring uses. While the emphasis is on industrial, manufacturing, and related uses, small-scale office and commercial uses intended to serve nearby industries and employees are permitted." A "Medium Industrial" district "allows a wide range of industries and industrial processes that involve more intensive operations .... [O]ffice and commercial uses intended to serve nearby industries and employees may be permitted." A "General Industrial" district is "considered the City's 'industrial sanctuary' district where a wide range of industries that may not be desirable in other districts may locate. The emphasis is on traditionally heavy and industrial and manufacturing uses." Exh. 218, at Z-172-173.

Appendix C

f. 7113-2-902. Lot Size: 8.6 acres. Zoning: General Industrial. This property is a vacant lot where certain minerals had previously been extracted from the land. It is located at Cherry Avenue and 69th Street.

g. 7113-13-40. Lot Size: 1.9 acres. Zoning: Medium Industrial. This property is occupied by an industrial building/commercial enterprise.

h. 7115-0-2. Lot Size: 25,000 square feet. Zoning: Commercial. An unoccupied two-story office building is located on this property. The site is located on the north side of Artesia near the 710 freeway.

i. 7115-2-5, 6, 9. Lot Sizes: one at 8,976 Square feet; two at 6,100 square feet. Zoning: Light Industrial. These lots are occupied by three single family residences and a mini-warehouse near Atlantic and 67th Street.

j. 7116-4-19. Lot Size: 2.8 acres. Zoning: General Industrial. This property is occupied by an auto wrecking center.

k. 7116-4-20. Lot Size: 7.4 acres. Zoning: General Industrial. This property is occupied by a vacant industrial warehouse.

l. 7119-18-20, 21. Lot Size: 4.7 acres. Zoning: Commercial. This site was formerly occupied by Builders Emporium Center. In September 1997, the building was vacant and for lease. A small, separate commercial structure is also located on this site. In September 1997, one of the units in the smaller commercial structure was vacant.

Appendix C

m. 7119-19-11. Lot Size: 1.2 acres. Zoning: Commercial. This site is occupied by a propane sales business.

n. 7119-19-12. Lot Size: 16,000 square feet. Zoning: Commercial. This site is occupied by an auto body repair and painting business.

o. 7119-19-13. Lot Size: 12,000 square feet. Zoning: Commercial. This site is occupied by a jeep repair/parts business.

p. 7119-20-1, 2, 3, 5, 6, 7. Lot Size: 42,105 square feet. Zoning: Commercial. This site is occupied by a multi-tenant commercial/retail center. The center consists of nine units and a freestanding fast-food restaurant. In September 1997, several of the units were vacant and for lease.

q. 7119-20-15. Lot Size: 5,125 square feet: Zoning: Medium Industrial. This site is occupied by an auto repair facility at the northwest corner of East Artesia Boulevard and Schilling Avenue.

r. 7119-20-19. Lot Size: 4,950 square feet. Zoning: Medium Industrial. This site is occupied by a veterinary clinic.

s. 7119-20-26. Lot Size: 13,800 square feet. Zoning: Medium Industrial. A commercial building/auto parts and tire business is located on this site.

t. 7119-20-27. Lot Size: 4,600 square feet. Zoning: Medium Industrial. This site is a vacant lot on the north side

of East Artesia Boulevard between Sarina and Minnesota Avenues.

u. 7119-20-28. Lot Size: 20,000+ square feet. Zoning: Medium Industrial. The site is occupied by a dry cleaning and laundry equipment facility.

v. 7119-20-31. Lot Size: 19,500 square feet. Zoning: Medium Industrial. This site is a vacant lot on the north side of East Artesia Boulevard between Schilling and Minnesota Avenues.

w. 7119-21-1, 2. Lot Size: 1.7 acres. Zoning: Medium Industrial. This site is occupied by an industrial valve and supply facility.

x. 7119-21-3. Lot Size: 19,525 square feet. Zoning: General Industrial. This site, which is located on the north side of East Artesia Boulevard and east of the L.A. & S.L. rail line, is occupied by a vacant commercial building.

y. 7119-21-4. Lot Size: 19,525 square feet. Zoning: General Industrial. This site consists of an occupied commercial/industrial building.

z. 7119-21-5. Lot Size: 19,525 square feet. Zoning: General Industrial. A commercial building occupied by an auto/truck towing service is located on this site.

aa. 7119-21-9. Lot Size: 18,925 square feet. Zoning: General Industrial. This site is occupied by a laundry and dry cleaning equipment facility. The site is located on the

north side of East Artesia Boulevard west of Paramount Boulevard.

ab. 7119-21-10, 11, 12, 13. Lot Size: 53,625 square feet. Zoning: General Industrial. This site contains a scrap metal and storage yard.

ac. 7119-21-15. Lot Size: 8,415 square feet. Zoning: General Industrial. This site is occupied by a stucco construction business. An industrial building and storage yard are located on this site.

ad. 7119-21-16. Lot Size: Unknown. Zoning: General Industrial. This site is utilized as a scrap metal yard.

ae. 7121-9-1. Lot Size: 16,000 square feet. Zoning: Light Industrial. This site is occupied by a machine tool shop.

af. 7121-9-40. Lot Size: 23,563 square feet. Zoning: Light Industrial. A two story multi-tenant commercial and office building is located on this site. In September 1997, several units were vacant.

ag. 7121-9-43. Lot Size: 23,200 square feet. Zoning: Light Industrial. A two story multi-tenant office building is located on this site. Part of the building is occupied by a construction firm.

ah. 7121-10-36. Lot Size: 30,516 square feet. Zoning: Light Industrial. This site contains a multi-tenant commercial structure with auto repair facilities. In January 1997, at least one unit was vacant.

Appendix C

ai. 7121-11-2. Lot Size: 18,000 square feet. Zoning: General Industrial. A single-story light industrial building is located at this site. The building is occupied.

aj. 7121-11-12. Lot Size: 5.91 acres. Zoning: General Industrial. This site contains a warehouse that is occupied by a building materials and construction hardware business.

ak. 7121-11-15. Lot Size: 4.8 acres. Zoning: General Industrial. In September 1997, this site was under construction as the future home of U.S. Rentals.

al. 7121-11-21. Lot Size: 32,430 square feet. Zoning: General Industrial. This site contains an industrial/office building. It is occupied by a printing business.

am. 7121-11-32. Lot Size: 32,430 square feet. Zoning: General Industrial. This site consists of an occupied industrial/office building.

an. 7121-11-33. Lot Size: 7 acres. Zoning: General Industrial. The site is occupied by a U-Haul facility and yard.

ao. 7157-13-12. Lot Size: 16,800 square feet. Zoning: Light Industrial. This site is occupied by an auto repair facility.

ap. 7157-13-13. Lot Size: 18,480 square feet. Zoning: Light Industrial. The site is occupied by an auto repair facility.

Appendix C

aq. 7306-22-49. Lot Size: 7.9 acres. Zoning: General Industrial. This site consists of an occupied industrial building.

ar. 7306-22-900. Lot Size: 5.2 acres. Zoning: General Industrial. The site is used as a parking lot for the industrial building located on Assessor parcel number 7306-22-900.

as. 7306-22-904. Lot Size: 8± acres. Zoning: General Industrial. The site consists of an occupied industrial building with adjacent parking lot.

35. *Airport Area*

a. 7148-20-9. Lot Size: 78,300 square feet. Zoning: General Industrial. This site consists of an office and industrial buildings. The buildings are occupied.

b. 7148-20-10. Lot Size: 78,300 square feet. Zoning: General Industrial. This site consists of an unoccupied industrial building.

c. 7148-20-11. Lot Size: 3.2 acres. Zoning: General Industrial. This site consists of several occupied industrial buildings on Cherry Avenue near 33rd Street.

d. 7148-20-12. Lot Size: 3.2 acres. Zoning: General Industrial. This site consists of an occupied industrial building with a materials processing yard.

e. 7149-9-2, 3. Lot Size: 10,000 square feet. Zoning: General Industrial. An auto repair/accessories business is located at this site.

Appendix C

f. 7149-9-4, 5. Lot Size: Unknown. Zoning: General Industrial. This site consists of a welding equipment shop.

g. 7149-9-6. Lot Size: 4,100± square feet. Zoning: General Industrial. This site consists of a two unit office building. The upper unit was vacant in September 1997.

h. 7149-9-6 & 7. Lot Size: 33,000 square feet. Zoning: General Industrial. This site consists of a multi-tenant office building. In September 1997, at least one unit was vacant.

i. 7149-10-1. Lot Size: 1.46 acres. Zoning: General Industrial. This site is occupied by a gas station equipment rental business.

j. 7149-10-2. Lot Size: 1.4 acres. Zoning: General Industrial. This site consists of two occupied commercial buildings.

k. 7149-13-908. Lot Size: Unavailable. Zoning: PD-9. This site consists of a multi-tenant office building. This property is located in a planned development zoning area designated PD-9. This planned zoning area contemplates a business park with professional offices and related services. Mini-theaters and arcades are precluded by Ordinance C-5762 adopted September 15, 1981.

l. 7149-13-911. Lot Size: Unavailable. Zoning: PD-9. This site consists of a multi-tenant office complex. It is located in a planned development zoning area designated PD-9. The development area contemplates professional businesses with related services. Mini-theaters and arcades

are precluded by Ordinance No. C-5762, adopted September 15, 1981.

m. 7149-13-919. Lot Size: Unavailable. Zoning: PD-9. This site consists of a multi-tenant office complex. It is located in a planned development zoning area designated PD-9. The development area contemplates professional businesses with related services. Mini-theaters and arcades are precluded by Ordinance No. C-5762, adopted September 15, 1981.

n. 7149-13-921. Lot Size: Unavailable. Zoning: PD-9. This site consists of a multi-tenant office complex. It is located in a planned development zoning area designated PD-9. The development area contemplates professional businesses with related services. Mini-theaters and arcades are precluded by Ordinance No. C-5762, adopted September 15, 1981.

o. 7149-13-922. Lot Size: Unavailable. Zoning: PD-9. This site consists of a multi-tenant office complex. It is located in a planned development zoning area designated PD-9. The development area contemplates professional businesses with related services. Mini-theaters and arcades are precluded by Ordinance No. C-5762, adopted September 15, 1981.

p. 7149-13-924. Lot Size: Unavailable. Zoning: PD-9. This site consists of a multi-tenant office complex. It is located in a planned development zoning area designated PD-9. The development area contemplates professional businesses with related services. Mini-theaters and arcades

are precluded by Ordinance No. C-5762, adopted September 15, 1981.

q. 7149-13-927. Lot Size: Unavailable. Zoning: PD-9. This site consists of a multi-tenant office complex. It is located in a planned development zoning area designated PD-9. The development area contemplates professional businesses with related services. Mini-theaters and arcades are precluded by Ordinance No. C-5762, adopted September 15, 1981.

r. 7149-13-928. Lot Size: Unavailable. Zoning: PD-9. This site consists of a multi-tenant office complex. It is located in a planned development zoning area designated PD-9. The development area contemplates professional businesses with related services. Mini-theaters and arcades are precluded by Ordinance No. C-5762, adopted September 15, 1981.

s. 7149-14-917. Lot Size: 3 acres. Zoning: PD-18. This property is occupied by a multi-tenant office building. It is a planned business development area designated PD-18. The development contemplates business offices and ancillary services. Ordinance C-6223, adopted January 7, 1986 and revised by Ordinance number C-6783, prohibit theaters and arcades in the development area.

t. 7149-14-928. Lot Size: 4.3 acres. Zoning: PD-18. This lot consists of a recreational vehicle storage/parking area with related storage and office facilities.

u. 7212-2-8. Lot Size: 22,400 square feet. Zoning: Medium Industrial. This site is occupied by a pump supply and service business.

v. 7212-2-9. Lot Size: 20,250 square feet. Zoning: Medium Industrial. This lot consists of an open storage area and industrial building adjacent to the pump supply business.

w. 7212-2-12. Lot Size: 16,800 square feet. Zoning: Medium Industrial. This is a vacant lot used for open storage of pipes.

x. 7212-2-13. Lot Size: 14,000 square feet. Zoning: Medium Industrial. This lot is vacant and is used for storage of pipes.

y. 7212-2-22. Lot Size: 32,000 square feet. Zoning: Medium Industrial. This lot is occupied by a used car dealer. It consists of an open parking area with related office facilities.

z. 7212-2-23. This lot is located in the City of Signal Hill.[3]

aa. 7212-2-26. Lot Size: 5.9 acres. Zoning: Medium Industrial. This lot is used for outdoor auto/truck parking.

ab. 7212-3-7. Lot Size: 3.9 acres. Zoning: Medium Industrial. This site consists of two industrial buildings, both of which are occupied.

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3. After the Court submitted this matter, the City withdrew this site as a proposed alternative location.

Appendix C

ac. 7212-3-12. Lot Size: 14,000± square feet. Zoning: Medium Industrial. This lot consists of an industrial building. In September 1997, it was available for lease/sale. *See* Exhibit 74.

ac. 7212-3-19. Lot Size: 17,800 square feet. Zoning: Medium Industrial. This lot is occupied by an auto sales business with related office facilities.

ad. 7212-4-11. Lot Size: 17,860 square feet. Zoning: Light Industrial. This lot is occupied by an auto parts retail business.

ae. 7212-4-12. Lot Size: 19,166 square feet. Zoning: Light Industrial. This lot is occupied by a printing company.

af. 7212-4-14. Lot Size: 13,506 square feet. Zoning: Light Industrial. This is a vacant lot used as a truck parking lot.

ah. 7212-4-17. Lot Size: 1.5 acres. Zoning: Light Industrial. A Charlie Brown's Restaurant is located on this site.

ai. 7212-9-911. Lot Size: 91 acres. Zoning: Light Industrial. This is undeveloped land that is currently used as a recycling center and public dump. According to the City, part of this site was an oil producing field. Plaintiff's Exhibit 181A indicates that the site is not readily accessible to retail customers and lacks appropriate infrastructure.

Appendix C

36. *Hughes Aircraft Area*

a. 7310-16-61. Lot Size: 1.3 acres. Zoning: Medium Industrial. This parcel consists of a vacant lot that is used for shipping container storage. In January 1997, the property was for sale.

37. *Traffic Circle*

a. 7219-9-3. Lot Size: 15,250 Square feet. Zoning: Commercial. This lot contains a four-unit commercial center. All of the units were occupied in September 1997.

38. *Seaport Village Area*

a. 7237-20-24. Lot Size: 16,000± square feet. Zoning: PD-1. This lot is occupied by a restaurant. The property is part of planned development and improvement area designated PD-1.

b. 7237-20-25. Lot Size: Unavailable. Zoning: PD-1. A multi-tenant, two-story office building is located on this site. This lot is part of a planned business development area designated PD-1, Area 25.

c. 7237-20-26. Lot Size: 21.12 acres. Zoning: PD-1. A multi-tenant regional commercial center is located on this lot. This lot is part of a planned development and improvement area designated PD-1, Area 18. In January 1997, fourteen retail units and two restaurant units were vacant.

Appendix C

d. 7237-20-40. Lot Size: Unavailable. Zoning: PD-1. A planned multi-tenant business/commercial development is located on this site. This site is also part of a planned development and improvement area designated PD-1, Area 25.

e. 7237-20-41. Lot Size: Unavailable. Zoning: PD-1. A planned multi-tenant business/commercial development is located on this site. This site is part of a planned development and improvement area designated PD-1, Area 25.

f. 7237-20-43. Lot Size: 4.25 acres. Zoning: PD-1. This is an undeveloped parcel of land that is part of a planned development and improvement area designated PD-1, Area 25.

g. 7237-20-44. Lot Size: ±3 acres. Zoning: PD-1. This is an undeveloped parcel of land that is part of a planned development and improvement area designated PD-1, Area 25.

h. 7237-20-45. Lot Size: included as part of preceding lot. Zoning: PD-1. This is an undeveloped parcel of land that is part of a planned development and improvement area designated PD-1, Area 25.

i. 7242-11-9. Lot Size: 2.2 acres. Zoning: PD-1. This lot consists of unimproved land. This lot is part of a planned development and improvement area designated PD-1, Area 29.

Appendix C

j. 7242-11-10. Lot Size: 16,000 square feet. Zoning: PD-1. This lot consists of unimproved land. This lot is part of a planned development and improvement area designated PD-1, Area 29.

k. 7242-11-11. Lot Size: 1.5 acres. Zoning: PD-1. This lot consists of unimproved land. This lot is part of a planned development and improvement area designated PD-1, Area 29.

l. 7242-12-6. Lot Size: 2.4 acres. Zoning: PD-1. A multi-tenant office building is located on this lot. This lot is part of a planned development and improvement area designated PD-1, Area 29.

39. *Port Area*

a. 7429-7-18. Lot Size: 2.9 acres. Zoning: General Industrial. This parcel is used for container pallete storage.

b. 7429-17-6. Lot Size: 10,000 square feet. Zoning: General Industrial. This lot is occupied by a welding and radiator repair shop.

c. 7429-17-905. Lot Size: 6,534 square feet. Zoning: General Industrial. This lot consists of vacant land.

d. 7429-17-910. Lot Size: 6,000 square feet. Zoning: General Industrial. This lot consists of vacant land.

e. 7429-41-37. Lot Size: 7,140 square feet. Zoning: General Industrial. An industrial building with outdoor storage is located on this property. The building is occupied.

Appendix C

f. 7429-41-46. Lot Size: 27,400 square feet. Zoning: General Industrial. An industrial building with outdoor storage is located on this lot. The building is occupied by an electric motor company.

g. 7432-3-16. Lot Size: 6,000 square feet. Zoning: General Industrial. A radiator repair shop is located on this site.

h. 7432-3-17. Lot Size: 12,000 square feet. Zoning: General Industrial. This lot is occupied by a restaurant.

i. 7432-3-18. Lot Size: 6,100 square feet. Zoning: General Industrial. A welding shop is located on this lot.

j. 7432-3-29. Lot Size: 10,700 square feet. Zoning: General Industrial. An industrial supply company is located at this site.

k. 7432-4-23. Lot Size: 11,160 square feet. Zoning: General Industrial. This site is occupied by a restaurant.

l. 7432-10-18. Lot Size: 5,040 square feet. Zoning: General Industrial. This lot is used for general industrial storage.

m. 7432-10-19. Lot Size: 10,080 square feet. Zoning: General Industrial. This site is occupied by a welding supply company.

n. 7432-10-20. Lot Size: 5040 square feet. Zoning: General Industrial. This site is used for parking for the office building.

o. 7432-10-21, 22, 23. Lot Size: 12,000 square feet. Zoning: General Industrial. An office building is located on this site.

p. 7432-10-24. Lot Size: 10,160 square feet. Zoning: General Industrial. The site is occupied by an auto/truck supply business.

q. 7432-19-23, 24, 25, 26. Lot Size: 50,000 square feet. Zoning: General Industrial. This site is occupied by a transport company with related open storage.

40. The City identified the following additional lots as potential sites for adult entertainment uses:

a. 7113-2-4. Lot Size: 17.8 acres. Zoning: General Industrial. This site is occupied by a Food 4-Less market and Home Base Center with related parking. Part of this site is located within a residential buffer zone. According to the City, it would be possible to subdivide the lot so that part of the lot would be outside the residential buffer zone.

b. 7119-18-27. Lot Size: 7+ acres. Zoning: Commercial. This site is a commercial center with a Food 4-Less market and related parking. Part of this site is located within a church buffer zone. According to the City, this lot could be subdivided so that part of the site would be outside the restricted buffer zone and would then be available for adult entertainment uses.

c. 7242-900. Lot Size: Unavailable. Zoning: PD-4, Area 2. This site consists of Marine Stadium and adjacent

property. The City does not suggest that Marine Stadium is available for adult entertainment uses. However, the City suggests the property south of Second Street on Marina Drive could be subdivided so that several parcels would be outside a residential buffer zone. These new subdivided sites would then be available for adult entertainment.

d. The commercial center adjacent to the Queen Mary tourist center. The leases for this commercial center exclude adult entertainment businesses.

41. Excluding the sites withdrawn by the City, the City has identified 115 potentially available alternative sites for adult entertainment establishments. With the exception of the ninety-one acre industrial site described in paragraph 35(ai), all the other industrial sites are accessible to the public and, as depicted in the photographic exhibits, have access to necessary utilities and other municipal services. The vacant lot previously used for mineral extraction described in paragraph 34(f) and the industrial site occupied by an auto wrecking center and junk yard described in paragraph 34(j) are excluded from the business real estate market under *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532 (9th Cir. 1993) (junk yards, steel yards, and car storage lots properly excluded under *Renton v. Playtime Theatres*, 475 U.S. 41 (1985)).

42. The 115 locations do not constitute the total market for alternative sites that potentially could be used for adult business establishments. The City did not attempt to identify every possible alternative location due to the cost of such a survey. The 115 sites identified by the City represent an

attempt by the City to show the existence of sufficient alternative locations available to the plaintiffs and other adult businesses.

43. Plaintiffs concede that eight sites are available for plaintiffs to relocate, and seven of these sites are more than 1,000 feet from each other. These sites are described in paragraph 34(a), parcel # 7075-1-1 (Exhibit 1); paragraph 34(l), parcel # 7116-18-20, 21 (Exhibit 12); paragraph 34(p), parcel # 7119-20-31 (Exhibit 22); paragraph 34(x), parcel # 7119-21-3 (Exhibit 24); paragraph 34(af), parcel # 7121-9-40 (Exhibit 32); paragraph 35(h), parcel # 7149-9-6 & 7 (Exhibit 53); paragraph 38(c), parcel # 7237-20-26 (Exhibit 86).

44. At least twenty-seven or twenty-eight[4] adult businesses could co-exist under the 1994 Ordinance. *See* Exhibit 160, Overall City Study Areas Depicting Sites City Claims are Available with 1,000 Foot Minimum Distance Between Sites.

45. Seven percent of the Commercial/industrial area of the City of Long Beach is available for adult entertainment businesses.

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4. Whether the minimum number is twenty-seven or twenty-eight is unclear because the vacant lot previously used for mineral extraction located at Cherry Avenue and 69th Street described in paragraph 34(f) has been excluded from the business real estate market by the Court. Based upon the evidence submitted, the Court cannot determine whether another site in this general area could replace the excluded site. This potential discrepancy is immaterial because even an ordinance that allows only twenty-seven adult businesses to co-exist in the City of Long Beach is constitutionally permissible.

Appendix C

46. Approximately forty percent of the City of Long Beach is zoned residential, nine percent of the City of Long Beach is zoned commercial, and nineteen percent of the City of Long Beach is zoned industrial.

47. Approximately 396 business licenses are applied for every month, and thirty-six of these (approximately ten percent) are for retail establishments. There are approximately 1271 retail business licenses in the City of Long Beach, and thirty-seven of the retail businesses are bookstores.

48. In addition to the four adult business establishments maintained by plaintiffs, there is a massage parlor that may also be required to relocate. The other known existing adult entertainment business — Angel's Nightclub — is in full compliance with the locational requirements of the 1994 Ordinance.

III.

Conclusions of Law

A. *Constitutional Considerations in Limiting the Location of Adult Businesses*

The Long Beach Ordinance does not ban adult businesses outright but simply limits the areas of the city in which they may operate. Because zoning laws such as the ordinance at issue target the secondary effects of adult businesses, rather than the content of the speech involved, they are considered content-neutral time, place, and manner restrictions and are

constitutionally permissible so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46 (1985). The parties do not dispute that curbing the secondary effects of adult businesses, such as neighborhood deterioration, crime, and decreased property values, is a substantial government interest. Only the second *Renton* factor is at issue in this case: whether the Long Beach ordinance unreasonably limits plaintiffs' alternative avenues of expression. *See* Pretrial Conference Order, ¶ 7(a).

Under *Renton*, cities may regulate adult businesses by dispersing them over an extended geographical area. 475 U.S. at 52. However, a local government infringes an adult business's First Amendment rights if it effectively denies the business a "reasonable opportunity to open and operate an adult theater within the city." *Id.* at 54; *see also Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993) (quoting *Renton*); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1107 (9th Cir. 1988) (same).

An adult business has a reasonable opportunity to open and relocate if (1) the available sites are part of an actual business real estate market, and (2) after excluding those sites that may not properly be considered to be part of the relevant market, there are an adequate number of potential relocation sites for already existing businesses. *Topanga Press*, 989 F.2d at 1530.

Appendix C

1. Standard for Defining the Relevant Market

A site is potentially available if (1) it is not unreasonable to believe that it would ever become available to any commercial enterprise, (2) it suits some generic commercial enterprise, although not every particular enterprise,[5] or (3) it is commercially zoned. *Topanga Press*, 989 F.2d at 1531. If a site is located in an industrial or manufacturing zone, it must also be reasonably accessible to the general public and have a proper infrastructure including sidewalks, roads, and lighting. *Id.*

Plaintiffs argue strenuously that occupied properties may not be included in the relevant market, yet they cite no authority for this proposition. In *Renton*, respondents asserted that some of the land in question "is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and that in general there are no 'commercially viable' adult theater sites within the 520 acres left open by the Renton ordinance." 475 U.S. at 53. The Supreme Court explained that the Ninth

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5. In *Topanga Press*, the court excluded sites from the relevant market that were located under the Pacific Ocean; in the Los Angeles Airport or Van Nuys Airport; in areas used as landfill; in areas used by the Port of Los Angeles and/or as oil refineries; on land occupied by junk yards, steel yards, and car storage lots; and on land used for petroleum gas storage. *Topanga Press*, 989 F.2d at 1532; *see also*, *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1982) (concluding that whether defined as physically or economically unsuitable, areas located among warehouses, shipyards, and undeveloped areas did not provide adult businesses with a reasonable opportunity to relocate).

Circuit had erred in accepting plaintiffs' argument that permissible locations were unavailable:

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.

Id. at 54.

Following *Renton*, the Fifth Circuit found it "patently irrelevant" that certain sites were unavailable either because the owner of the site would not rent or sell to an adult business or because the site was currently occupied. *Woodall v. City of El Paso*, 49 F.3d 1120, 1125-26 (5th Cir. 1995). The *Woodall* court concluded that neither of these factors was "of any obvious concern under Renton." *Id.* Likewise, in discussing the "ground rules" for determining whether adequate alternative sites exist for adult businesses, Judge Collins of this District determined that it was "not particularly relevant" under *Renton* that almost none of the undeveloped land was for sale or lease and that commercially viable sites were lacking. *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1257, 1264 (C.D. Cal. 1995), *aff'd* 99 F.3d 1147 (9th Cir. 1996) ("*3570 East Foothill I*").

Appendix C

Even properties with a restrictive lease banning adult businesses are considered "potentially available" because the Supreme Court has declined to carve out special rules for adult businesses competing in the real estate market. *See Renton*, 475 U.S. at 53; *Topanga Press*, 989 F.2d at 1531, 1532 ("The issue is whether any site is part of an actual market for commercial enterprises generally. . . . The City is correct that at times Mr. Bailey improperly considered factors such as . . . whether adult businesses would not be welcomed by landlords.").

a. Burden of Proof

Preliminarily, we dispose of the plaintiffs' argument that the City bears the ultimate burden of proof to show that there are a reasonable number of alternative sites potentially available to plaintiffs under the terms of the 1994 Ordinance. Plaintiffs contend that not only must the City come forward with specific alternative sites, but the City must also show that such sites are truly available to plaintiffs by showing that each site is neither occupied nor encumbered by a long-term lease or other similar encumbrance. The Court disagrees.

Defendant has come forward with a significant number of alternative sites but plaintiffs find them to be unsatisfactory, primarily because most of the properties are occupied. Plaintiffs bear the ultimate burden of proof:

> The Adult Businesses had the burden of proving that the Ordinances denied them a reasonable opportunity to open and operate their businesses

> by failing to provide reasonable alternative avenues of communication. To meet their burden, the Adult Businesses had to show that the areas left open to them were inadequate to satisfy the demand for adult business locations.

Woodall, 49 F.3d at 1125.

Few lower courts have addressed the burden of proof issue directly. In *BBI Enterprises, Inc. v. City of Chicago*, plaintiff BBI had the burden of proving its constitutional challenge. In pointing out that both parties' proofs had deficiencies, the district court stated "where as here neither side has supplied entirely reliable information, the party having the burden of persuasion — here BBI — must suffer the consequences of such uncertainty." 874 F. Supp. 890, 895 (N.D. Il. 1995). In *T-Marc, Inc. v. Pinellas County*, the Court held that the law does not require defendants to confirm that the sites are economically and logistically viable, except as it relates to the terms of the ordinance. 804 F. Supp. 1500, 1504 (M.D. Fla. 1992). The *T-Marc* court determined that the County had met its burden of complying with the ordinance "by presenting evidence that 123 alternative sites complied with the distance restriction in the ordinance." *Id.* (following *SDJ, Inc. v. City of Houston*, 636 F. Supp. at 1359, 1370 (S.D. Tex. 1986), *aff'd*, 837 F.2d 1268 (5th Cir. 1988)).

Here, the Court need not decide which party had the initial burden of identifying potentially available alternative sites because the City assumed this obligation early in the litigation. The ultimate burden of persuasion, however, falls on the plaintiffs, who initiated this action. Consequently,

plaintiffs have the burden of showing that the alternative sites identified by the City are not potentially available for use as a commercial establishment.[6]

b. Application

Commercially zoned sites are part of the relevant real estate market. *Topanga Press*, 989 F.2d at 1531. There are nine sites specifically zoned for commercial purposes. There are an additional twenty-three sites located in planned development and improvement areas which are intended for commercial purposes. Additionally, the area adjacent to the Queen Mary, as described in paragraph 40(d), is intended for commercial uses. The three commercial sites described in paragraphs 40(a), 40(b) and 40(c), however, must be excluded from the potential market because they are located within a prohibited buffer zone. By the terms of the Ordinance, these sites are unavailable for use as adult businesses. Although locations could possibly be subdivided, that event is far too speculative to support the City's argument that they should be included in the relevant market.

Despite the presence of a restrictive lease provision prohibiting an adult business establishment in the commercial

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6. During closing arguments, plaintiffs argued that the burden of proof rested with the City. If the Court were to conclude otherwise, plaintiffs requested that the Court vacate the submission and allow them to supplement the record with additional evidence regarding such matters as whether any site is owner-occupied, the length of any lease and the current availability of the sites identified by the City. The Court denies plaintiffs' request because such evidence would be immaterial under *Renton* and *Topanga Press*.

center adjacent to the Queen Mary, the sites located in that center are properly included in the potential market. As noted above, under *Renton* and *Topanga Press*, properties with restrictive lease provisions are, nonetheless, part of the relevant business real estate market.

Sites in industrial zones are part of the relevant market if three criteria are met: (1) the site is reasonably accessible to the public; (2) the site contains proper infrastructure; and (3) the site suits some generic commercial enterprise, but not any specific one. *Id.*

Here, the majority of the industrial zoned sites — with the exception of the ninety-one acre site described in paragraph 35(ai), the vacant lot previously used for mineral extraction described in paragraph 34(f), and the industrial site occupied by an auto wrecking center and junk yard described in paragraph 34(j) — are potentially available for use as an adult business. With respect to the ninety-one acre site, the evidence does not establish that it is reasonably accessible to the public or that it contains a proper infrastructure to support commercial development. The vacant lot once used for mineral extraction and the site used as an auto wrecking center are analogous to the junk yards and steel yards excluded in *Topanga Press*. The remaining industrial sites satisfy the criteria established by *Topanga Press*.

In sum, after evaluating each site identified by the City under the tests established by *Renton* and *Topanga Press*, there are at least 109 alternative locations potentially available for use as an adult business. Moreover, the evidence

established that at least twenty-seven adult entertainment business could co-exist when the 1,000 foot buffer between adult businesses is taken into account.

2. Determining Whether the Number of Relocation Sites is Constitutionally Adequate

a. A Reasonableness Standard Applies

Once areas not part of the relevant market are excluded, the Court must then determine whether the remaining sites provide adult businesses forced to move with a reasonable opportunity to relocate. *Topanga Press*, 989 F.2d at 1533. There are no bright line rules defining when a given number of relocation sites is constitutionally adequate. Factors that courts have used to assess reasonableness include: (1) the percentage of land potentially available to adult businesses; (2) the number of sites available in relation to the city's population; (3) the number of sites compared with the existing number of adult businesses; and (4) the number of businesses desiring to offer adult entertainment. *3570 East Foothill I*, 912 F. Supp. at 1265. Given the distance requirements of the Long Beach ordinance, the more relevant inquiry is the number of adult businesses that can co-exist simultaneously. *See id.*

Whether the number of relocation sites comports with the First Amendment is a highly fact-specific inquiry, and no constitutional minimum has been established. For example, in *Topanga Press*, the Ninth Circuit affirmed the district court's finding that Los Angeles' 102 adult businesses did not have adequate alternatives for expression because

there did not appear to be enough relocation sites to accommodate a reasonable number of the adult businesses. 989 F.2d at 1533 (120 sites). In a later case in the Central District, *Young v. City of Simi Valley*, Judge Rea found that four potential relocation sites did not amount to a reasonable number of alternative means of communication. 977 F. Supp. 1017, 1022 (C.D. Cal. 1997). In *3570 East Foothill Blvd., Inc. v. City of Pasadena* ("*3570 East Foothill II*"), Judge Collins concluded that an ordinance limiting adult businesses to eleven relocation sites was constitutionally adequate given that there was only one adult business located in Pasadena. 980 F. Supp. 329, 343 (C.D. Cal. 1997).

Courts in other circuits have reached varied results. *See, e.g.*, *Woodall*, 49 F.3d at 1127 (where more "reasonable" sites were available than businesses with demands for them, limitations found constitutionally adequate); *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.*, 973 F.2d 1255, 1260 (5th Cir. 1992) (where there were more sites available than adult businesses needing to relocate, "as a matter of arithmetic" the number was reasonable); *International Eateries of America v. Broward County, Florida*, 941 F.2d 1157, 1165 (11th Cir. 1991) (twenty-six sites available to an adult entertainment establishment complied with *Renton*); *Alexander v. City of Minneapolis*, 698 F.2d 936, 938-39 (8th Cir. 1983) (ordinance unconstitutional because it permitted only twelve relocation sites for thirty businesses); *CLR Corp. v. Henline*, 702 F.2d 637, 639 (6th Cir. 1983) (ordinance that permitted only two to four restricted uses in a half-mile strip of the city invalid); *Lady J. Lingerie v. Jacksonville*, 973 F. Supp. 1428, 1437 (M.D. Fla. 1997) (ninety-five sites provided reasonable

avenues of alternative communication as a matter of law); *T-Marc*, 804 F. Supp. at 1504 (123 available sites more than adequate).

b. Application

As noted above, there are 109 commercial and industrial locations potentially available for use as adult businesses and twenty-seven adult business establishments could co-exist under the provision of the 1994 Ordinance.

The fact that some of the 109 sites are occupied and unavailable or economically unfeasible is immaterial. Defendant is not required to guarantee plaintiffs sites at economical rates. *Renton*, 475 U.S. at 54. "While the County must provide reasonably adequate alternative locations, the County is not required to guarantee plaintiffs a profit at the expense of public interest." *Function Junction, Inc. v. City of Daytona Beach*, 705 F. Supp. 544, 552 (M.D. Fla. 1988).

The four adult businesses maintained by plaintiffs must relocate under the 1994 Ordinance. The evidence also suggests that there is one additional adult business — a massage parlor — that also must relocate. The only other adult business — Angel's Night Club — fully complies with the 1994 Ordinance locational requirements. Thus, at most, five adult businesses must relocate within the City.

The number of alternative sites is significantly larger than in those cases in which the ordinances were struck down. The potential market is more than adequate for four to five adult businesses. The fact that twenty-seven adult businesses could co-exist further supports the Court's conclusion.

Appendix C

3. Amortization Period

The ordinance in question was adopted in 1988 with a compliance date for non-conforming uses set for August 1, 1990. Plaintiffs were able to extend this date until August 1, 1993. The 1994 Ordinance provided for an additional eighteen month amortization period ending May 18, 1996.

An amortization period must be reasonably measured by the burden on existing businesses. *Ebel v. City of Corona*, 767 F.2d 635, 639 (9th Cir. 1985) (*Ebel II*); *see also T-Marc*, 804 F. Supp. at 1504; *SDJ, Inc.*, 636 F. Supp. at 1371. In striking down an amortization period of sixty days in *Ebel II*, the Ninth Circuit looked to the factors considered by the Washington Supreme Court in an earlier case: the specific circumstances of the non-conforming business, its lease obligation and the ease by which it could convert to a non-adult business. *Ebel II*, 767 F.2d at 639 (following *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1159-60 (1978) (three month amortization period held reasonable)).

Although plaintiffs argue that the eighteen month amortization period is unreasonable, they make no showing as to the terms of their lease obligation or particular circumstances making it unduly burdensome for them to relocate within eighteen months. In fact, owners Seung Chun Lim and Robert Blake made little effort to find alternative sites for their businesses. Larry Spahr found one location, but it was too expensive. Plaintiffs were on notice as early as 1988 that they would have to move, yet they did nothing.

Appendix C

Other courts have upheld amortization periods of less than eighteen months. *See Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 830 (4th Cir. 1996) (six month amortization period approved for existing establishments); *T-Marc*, 804 F. Supp. at 1505 (one year amortization period upheld); *SDJ, Inc.*, 636 F. Supp. at 1371 (six month amortization period upheld). Given the circumstances, the eighteen month amortization period was reasonable.

B. *Plaintiffs' Equal Protection Claim*

Plaintiffs allege that the City's practice of forcing existing adult businesses to relocate while allowing non-conforming non-adult businesses to remain indefinitely singles out adult businesses for unfavorable treatment in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

The Equal Protection Clause protects against arbitrary classifications of laws and regulations and requires that similarly situated persons be treated equally. *See* U.S. Const. Amend. XIV; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Although the Equal Protection Clause protects against unreasonable classifications, a plurality of the Supreme Court stated in *Young v. American Mini Theatres* that society's interest in protecting communication in the area of adult entertainment was less important than the interest in unfettered political debate and that the city's interest in curbing the secondary effects and preserving the character of the neighborhood supported the classification. 427 U.S. 50, 70-72 (1976).

Moreover, the two types of non-conforming uses are not similarly situated. Two of plaintiffs' businesses are located on Pacific Coast Highway between Hayes and Termino Avenues, where prostitution and lewd behavior are a problem. Another of plaintiffs' businesses on Atlantic Boulevard was the site of over fifty arrests for lewd conduct from January 1994 to December 1996, as Mr. Spahr acknowledged during the trial. The unequal treatment of non-conforming adult businesses in Long Beach is based on the deleterious effects they have on the surrounding environment. *See Young*, 427 U.S. at 82 n. 6.

The Court's conclusion that the statute does not violate plaintiffs' right to the equal protection of the law is based on largely the same rationale as that leading the Court to find no First Amendment violation. Because the ordinance targets the secondary effects of adult businesses and not the content of protected speech, strict scrutiny is not triggered under the First Amendment. Instead, the rational relationship test applies. Where a fundamental right is not implicated, a classification created by a zoning law is subject to minimal scrutiny. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) ("We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a (permissible) state objective.' ").

There is no evidence of any intent to discriminate on the content of plaintiffs' speech. Thus, the ordinance passes muster if the City has a rational basis for treating adult uses differently than other non-conforming uses. *See, e.g.*,

Appendix C

Schneider v. City of Ramsey, 800 F. Supp. 815, 823 (D. Minn. 1992), *aff'd* 12 F.3d 140 (8th Cir. 1994). Because the statute has only an incidental effect on protected expression and the unequal treatment of adult and non-adult establishments does not directly threaten expression, the classification is rationally related to an important state interest — curbing the secondary effects of adult businesses.

IV.

CONCLUSION

Because it is designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication, the 1994 Ordinance, as applied to plaintiffs, does not deprive plaintiffs of their First Amendment rights. The City has proffered 109 sites to which plaintiffs may relocate. Furthermore, because plaintiffs' adult businesses are not similarly situated to other nonconforming businesses, the fact that only adult businesses must relocate does not offend the Equal Protection Clause. The restrictions set forth in the 1994 Ordinance are rationally related to the governmental interest in curbing the secondary effects of adult entertainment businesses. Consequently, the City is entitled to a judgment dismissing this action on the merits and an order vacating the stipulated preliminary injunction. Defendant shall also recover its costs of suit. Judgment shall be entered forthwith.

Because plaintiffs have advised the Court that they intend to appeal any adverse judgment and seek an injunction pending appeal, the Court's preliminary injunction shall

remain in effect for twenty days following entry of the judgment so that plaintiffs may seek appropriate relief from the Ninth Circuit.

IT IS SO ORDERED.

DATE: May 15, 1998

s/ Richard A. Paez
Richard A. Paez
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 96-2742 RAP (RMBx)

SEUNG CHUN LIM, FLUFFY, INC.,
5436 SANTA MONICA BOULEVARD, INC.,

Plaintiffs,

v.

CITY OF LONG BEACH,

Defendant.

JUDGMENT

This action came on for trial before the Court, Honorable Richard A. Paez, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant City of Long Beach recover of the plaintiffs, Seung Chun Lim; Fluffy, Inc.; and Santa Monica Boulevard, Inc., its costs of action.

It is further ordered that the Preliminary Injunction issued by the Court on May 6, 1996, shall expire on the 4th day of June, 1998.

Appendix C

Dated at Los Angeles, California, this 15th day of May, 1998.

s/ Richard A. Paez
Richard A. Paez
U.S. District Judge

Supreme Court, U.S.
FILED
DEC 18 2000
OFFICE OF THE CLERK

(2)

No. 00-814

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF LONG BEACH,

Petitioner

v.

SEUNG CHUN LIM, FLUFFY, INC. a California corporation, and 5436 SANTA MONICA BOULEVARD, INC., a California corporation,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

I OPPOSITION.....1

II STATEMENT OF THE CASE.....1

III REASONS FOR DENYING CERTIORARI.....5

A. Question 1: Burden of Proof.....5

B. Question 2: Long Term Lease.....12

C. Question 3: Sufficiency of Alternative Sites.....19

IV CONCLUSION.....22

TABLE OF AUTHORITIES

FEDERAL CASES

Alameda Books, Inc. v. City of Los Angeles,
222 F.3d 719 (9th Cir. 2000).....4

BBI Enterprises, Inc. v. City of Chicago,
874 F. Supp. 890 (N.D. Ill 1995) 11

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d
469 (1983).....8

Boos v. Barry,
485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d
333 (1988).....7

City of Cincinnati v. Discovery
Network, Inc., 507 U.S. 410, 113 S. Ct.
1505, 123 L. Ed. 2d 99 (1993).....6

City of Renton v. Playtime Theaters,
475 U.S. 41, 106 S. Ct. 925, 89 L. Ed.
2d 29 (1986) 5

Diamond v. City of Taft,
215 F.3d 1052 (9th Cir. 2000).....4

Erznoznik v. City of Jacksonville,
422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed.
2d 125 (1975) 7

Ladue v. Gilleo,
512 U.S. 43, 114 S.CT. 2038, 129 L. Ed.
2d 36 (1994).....9

Lim v. City of Long Beach,
217 F.3d 1050 (9th Circuit 2000).....4

Ohio v. Robinette,
519 U.S. 33, 136 L. Ed. 2d 347,
117 S. Ct. 417 (1996).....12

Phillips v. Borough of Keyport,
107 F.3d 164 (3rd Cir. 1997).....5

Phillips v. Borough of Keyport,
_____ U.S. _____, 118 S. Ct. 336,
139 L. Ed. 2d 261 (1997).....6

Schad v. Borough of Mt. Ephraim,
452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed.
2d 671 (1981).....6

T-Marc, Inc. v. Pinellas County,
804 F. Supp. 1500 (M.D. Fla. 1992).....11

Topanga Press, Inc. v. City of Los Angeles,
989 F.2d 1524 (9th Cir. 1993).....14

Vance v. Terrazas,
444 U.S. 252, 62 L. Ed. 2d 461,
100 S. Ct. 540 (1980).....12

Woodall v. City of El Paso,
49 F.3d 1120 (5th Cir. 1990).....10

Young v. American Mini Theaters,
427 U.S. 50, 49 L. Ed. 2d 310,
96 S. Ct. 2440 (1976) 18

Young v. City of Simi Valley,
216 F.3d 807 (9th Circuit 2000).....4

STATE CASES

People v. Superior Court (Lucero),
49 Cal. 3d 14 1

Walnut Properties, Inc. v. City Council,
100 Cal. App. 3d 1018 1

DOCKETED CASES

City of Long Beach v. Lim,
No. 814 4

City of Los Angeles v. Alameda Books,
No. 799 4

City of Simi Valley v. Young,
No. 701.....4

Diamond v. City of Taft,
No. 608 4

I OPPOSITION TO PETITION

Respondents oppose the granting of certiorari.

II STATEMENT OF THE CASE

The City of Long Beach is located south of the City of Los Angeles and is within the County of Los Angeles. It is approximately 50 square miles in size and in 1997 (the year of the trial) had a population in excess of 452,283 persons.

Beginning in 1977 the City of Long Beach (hereinafter "the City") has attempted to prohibit adult bookstores and adult theaters from operating within its boundaries (Appendix C, p. 26a). See generally Walnut Properties, Inc. v. City Council, 100 Cal.App.3d 1018; 161 Cal.Rptr. 411 (1980) and People v. Superior Court (Lucero), 49 Cal.3d 14; 259 Cal.Rptr. 740; 774 P.2d 769 (1989). By 1988 only 12 adult businesses remained in the City (Exh. 205). The City's goal of having no adult businesses has been carried out by various ordinances which theoretically allow some adult businesses but which, as a practical matter, make it extremely difficult for such businesses to operate.

In November of 1994 the City adopted the most recent adult zoning ordinance, the one which is the subject of the current litigation. The November 1994 ordinance ("the ordinance") required all existing adult bookstores and theaters to relocate because none complied with the drastic locational requirements of the ordinance. Respondents are essentially three human beings who have owned and

operated four adult businesses in the City for many years. Respondent Seung Chun Lim's stores are located at 1529 West Pacific Coast Highway ("Pacific World") and 6037-39 Atlantic Avenue ("T & C World"). Respondent Robert Blake is 80 years old and operates his adult bookstore (South Seas Adult Bookstore) at 1567 West Pacific Coast Highway through his corporation, Fluffy, Inc., which is the official respondent herein. Likewise, Larry Spahr, an elderly gentleman, operates the Front Door Adult Theater and Bookstore at 5832-34 North Atlantic Boulevard through his corporation known as 5436 Santa Monica Boulevard, Inc..

These three men were forced to move by the ordinance even though nothing was really available to them as a practical matter. All three attempted to testify at the trial in this case. Mr. Lim, whose primary language is Korean, tried to testify in English. His testimony was stricken because the District Judge could not understand him. Blake and Spahr did testify. All three were given 1 ½ years to relocate their businesses. They sued for injunctive relief because they contended the City had no right to force existing adult businesses to relocate when the City did not require non-adult businesses that were not in the proper zones (known as "non-conforming uses" in the language of municipal land use or zoning law) to move. In other words, the City was discriminating against adult businesses by allowing other non-conforming businesses to remain indefinitely. In addition, Respondents contended there were not sufficient available alternative locations in the City where adult businesses could lawfully operate.

At the trial the District Court rejected their First

Amendment/Equal Protection contention. In addition, the District Court rejected their second contention - unavailability of sufficient alternative locations - by placing the burden of proving the existence of such sufficient alternative locations upon Respondents.

Finally, the District Court ruled that properties identified by the City were "available" even though they were occupied by other businesses.

Examples of properties the District Court ruled were available for Respondents for relocation purposes were lumberyards, truck storage centers, the Naval Hospital, Danny's Auto Painting and Collision Center, a veterinary clinic, a dry cleaning and laundry equipment facility, an industrial valve and supply business, an auto/truck towing service, a scrap metal storage yard, a building materials and construction hardware business, a welding equipment shop, a gas station equipment rental business, and numerous multi-tenant professional business office buildings. Essentially, the District Court ruled that Mr. Blake, then 78 years old, could be required by the City to move his retail store to a lumberyard or auto/truck towing service. The District Court expressly ruled that it was "immaterial" that the properties which were zoned for adult uses were " . . . occupied and unavailable. . . ." (Appendix C, p. 65a). The District Court explained in footnote 6 that it was "immaterial" that sites were owner-occupied, subject to leases, or not available (Appendix C, p.61a).

The District Court concluded that given the requirements of the ordinance, including the requirement that no adult business could be within 1000 feet of another adult

business, in theory 27 adult businesses could operate simultaneously in the City. Accordingly, the District Court, acknowledging the existence of Respondents' four adult businesses and a fifth one which was not a party to the litigation, ruled the ordinance to be constitutional as applied. It therefore dissolved the preliminary injunction which it had previously issued pursuant to stipulation and then stayed the order for 20 days to give Respondents the opportunity to appeal and obtain a stay from the Ninth Circuit Court of Appeals, which granted the stay pending appeal (Circuit Judges Thompson and Leavy).

On June 20, 2000 the Ninth Circuit decided Young v. City of Simi Valley, 216 F.3d 807 (9th Circuit 2000), also an adult zoning case. On June 27, 2000 the Ninth Circuit decided Diamond v. City of Taft, 215 F.3d 1052 (9th Cir. 2000), also an adult zoning case. On June 27, 2000 the Ninth Circuit decided the instant case, Lim v. City of Long Beach, 217 F.3d. 1050 (9th Circuit 2000). Finally, on July 27, 2000, the Ninth Circuit decided Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000), still another adult zoning case. All four of these cases are now pending before this Court:

(1) Diamond v. City of Taft, No. 608
(2) City of Simi Valley v. Young, No. 701
(3) City of Los Angeles v. Alameda Books, No. 799
(4) City of Long Beach v. Lim, No. 814

The Ninth Circuit in the instant case correctly held that in adult zoning cases the burden of proof is on the City to justify the adult zoning ordinance (Appendix A, p.6a). The Ninth Circuit also correctly ruled that in relocation

adult zoning cases property encumbered by long term leases are not part of the relevant real estate market within the meaning of City of Renton v. Playtime Theaters, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The Ninth Circuit did not reach the issue of sufficiency of alternative sites. The City is seeking certiorari on these three issues.

Finally, the Ninth Circuit upheld the District Court's ruling that the First and Fourteenth Amendments (free speech/equal protection) are not violated by a City's requirement that non-conforming adult businesses relocate, but that non-conforming non adult businesses may remain and continue to "violate" recently adopted zoning ordinances. Respondents contend that the enactment and retroactive enforcement of adult zoning ordinances violate the First Amendment because they deter the opening of new adult businesses in proper zones. Prospective adult business owners fear that they will be forced to shut down shortly after opening. On these points Respondents are filing a cross petition for writ of certiorari.

III REASONS FOR DENYING CERTIORARI

A. Question No. 1: Burden of Proof

The Ninth Circuit below held that in adult zoning cases the burden of proof as to the existence of alternative sites for the relocation of adult businesses is on the City. In this respect the Ninth Circuit reversed the District Court. The decision of the Ninth Circuit was consistent with related cases decided by this Court and also with the en banc decision of the Third Circuit in Phillips v. Borough of Keyport, 107 F.3d 164, 177 (3rd Cir. 1997) (expressly

holding that in a challenge to the constitutionality of an adult zoning ordinance the burden of proof is on cities to prove affirmatively the existence of a sufficient number of constitutionally available locations for adult businesses to allow ample alternative locations for such businesses). This Court denied certiorari. See Phillips v. Borough of Keyport, ___ U.S. ___, 118 S.Ct. 336, 139 L.Ed.2d 261 (1997).

This Court has repeatedly placed the burden of proof on the government to justify restrictions on free speech. In Schad v. Borough of Mt. Ephraim, 452 U.S 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), the Court imposed upon the Borough of Mount Ephraim the need to justify enactment of a zoning restriction which precluded nude dancing and any other form of live entertainment.

> "[T]he onus of demonstrating that no less intrusive means will adequately protect the . . . state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden [upon expression]." 452 U.S. at 69 n.7 (emphasis added).

Thereafter, the Schad Court repeatedly found the ordinance defective **due to the city's failure of proof**.

Similarly, in City of Cincinnati v. Discovery

Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the Court, in rejecting the City's claim that its commercial news rack ban was a content-neutral time, place, and manner restriction, stated that "[i]t is the absence of a neutral justification for [the] ban . . . that prevents the city from defending its news rack policy as content-neutral." 507 U.S. at 429-30, 113 S.Ct. at 1517.

In Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed. 2d 333 (1988) the Court rejected the notion that the District Court of Columbia's ban on carrying signs critical of foreign governments in front of foreign embassies was a "content-neutral" restriction after noting that the government had failed to justify it on that basis:

> "Respondents and the United States do not point to the 'secondary effects' of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies." 485 U.S. at 321, 108 S.Ct. 1164.

Finally, in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the Court held that an ordinance prohibiting showing of films containing nudity by a drive-in theater was not a content-neutral ordinance because the city "offers no [content-neutral] justification" and that [a]bsent such a justification,

the ordinance cannot be salvaged." 422 U.S. at 215, 95 S.Ct. at 2268.

In all these cases, the Court looked very closely at the challenged law or ordinance to see if it was indeed a content-neutral time, place and manner restriction and in all of these cases, the burden was placed upon the enacting governmental entity to demonstrate that the ordinances in fact met all applicable constitutional tests.

Even in the area of the less protected commercial speech, the Court has consistently imposed a strong burden of justification on the governmental entity which establishes the challenged regulation. See e.g., Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 n.20, 103 S.Ct. 2875, 2882 n.20, 77 L.Ed.2d 469 (1983) ("[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it); accord Edenfield v. Fane, 507 U.S. 761, 770-71, 113 S.Ct. 1792, 1800 123 L.Ed.2d 543 (1993); 44 Liquormart, Inc.v. Rhode Island, 571 U.S. __, __, 116 S.Ct. 1495, 1509, 115, 134 L.Ed.2d 711 (1996) and Rubin v. Coors Brewing Co., 514 U.S. _ , __, 115 S.Ct. 1585, 1592, 131 2d 532 (1995).

Schad made clear that the burden is on the City not only to justify the need for its ordinance, but also to demonstrate that the ordinance provides ample alternative avenues of communication. The Court unmistakably imposed upon the Borough of Mount Ephraim the burden of showing that its ordinance allowed ample alternative avenues of communication. 452 U.S. at 76-77, 101 S.Ct. at 2186-87. The Borough attempted to discharge that burden by pointing to the existence of other adult businesses in

nearby communities not within the jurisdiction of the Borough. Id. The Court concluded that the presence of such businesses in nearby communities was legally irrelevant and, as a result, the Borough had failed to meet is burden of showing that the ordinance provided ample alternative avenues of communication.Id.

Moreover, Ladue v. Gilleo, 512 U.S. 43, 114 S.CT. 2038, 129 L.Ed.2d 36 (1994), reaffirmed the ruling of Schad that it is the governmental entity enacting a speech restriction which bears the burden of proof in justifying it as a mere regulation of the "time, place, or manner" of speech and, in particular, in showing that it leaves open ample alternative channels for communication. Specifically, Ladue, involved a challenge to an ordinance which prohibited all persons, including homeowners, from posting signs in residential neighborhoods (including on their own property) except for certain express categories of signs. By virtue of the exceptions in the ordinance, the Court of Appeals had concluded that the ordinance was an impermissible content-based restriction on speech.

The Supreme Court affirmed the judgment of the Court of Appeals but went out of its way to address the city's secondary contention that the ordinance could survive constitutional scrutiny if analyzed as a "mere regulation of the 'time, place, or manner' of speech." 512 U.S. at __, 114 S.Ct. at 2046. In responding to that argument, the Court made it clear that the City had the burden to persuade the Court that the ordinance left open ample alternative channels for communication;

"Ladue contends, however,

> that its ordinance is a mere regulation of the 'time, place or manner' of speech.... However, even regulations that do not foreclose an entire medium of expression, but merely shift the time, place or manner of its use, must 'leave open ample alternative channels for communication.' In this case, we are not persuaded [by the city's assertion] that adequate substitutes exist for the important medium of speech that Ladue has closed off." 512 U.S. at _, 114 S.Ct. at 2046 (emphasis added) (internal citation omitted).

By stating, "we are not persuaded that adequate substitutes exist," the Court in Ladue made clear that the burden was on the city to so persuade it. Again, Ladue did not establish new law but was simply another case consistent with a long lime of Supreme Court decisions imposing upon the governmental entities enacting speech restrictions the burden of proving that they can be justified as reasonable time, place, and manner restrictions.

Respondents do concede that the Fifth Circuit in Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1990) suggested, with no analysis, that the plaintiff adult businesses had the burden of proof. The Fifth Circuit

assumed that the burden of proof was upon the plaintiffs apparently just because they were plaintiffs. It was this case upon which the District Court below relied for its conclusion that plaintiffs here had the burden of proof. The District Court also relied upon BBI Enterprises, Inc. v. City of Chicago, 874 F.Supp. 890 (N.D. Ill 1995) and T-Marc, Inc. v. Pinellas County, 804 F. Supp. 1500 (M.D. Fla. 1992), but neither of these District Court decisions is persuasive. Aside from the constitutional view point, as a practical matter the burden should be on the positive side, not negative side. How does one prove a negative - that no alternative sites exist. The city is in the best position to establish the existence of alternative locations. Presumably cities do studies when adopting these kinds of ordinances. Cities must have maps and other data, such as business license information, readily available to them to establish the existence of properties.

Given the express holding of the en banc Third Circuit, which the District Court below ignored, given the logic of not requiring one to prove a negative, and considering prior, related decisions of this Court, the "circuit split" between the Ninth Circuit's decision and the Fifth Circuit's decision in Woodall v. City of El Paso, supra is not significant to warrant review by this Court.

If this Court does grant certiorari on this question, Respondents will ask this Court to reject that portion of the Ninth Circuit's burden of proof ruling that states,

> ". . . [W]here a city has provided a good faith and reasonable list of potentially

> available properties, it is for the plaintiffs to show that, in fact, certain sites would not reasonably become available. . . . The burden of showing that particular sites would not reasonably become available rests with the plaintiffs." Appendix B, p. 21a).

The quotation above weakens the holding of the Ninth Circuit on the burden of proof issue and seems to place some of the burden on the adult business, not the city. To this extent the Ninth Circuit erred. This subsidiary burden of proof issue is fairly included within Question No. 1. This Court would have jurisdiction under Rule 14.1(a) to consider the question of whether the Ninth Circuit erred in limiting the scope of the burden of proof it placed upon cities. See Ohio v. Robinette, 519 U.S. 33, 38, 136 L.Ed.2d 347, 117 S.Ct. 417, 420 (1996) and Vance v. Terrazas, 444 U.S. 252, 258-259, n. 5, 62 L.Ed.2d 461, 100 S.Ct. 540, 544-545, n. 5 (1980).

In summary Respondents oppose the granting of certiorari on Question No. 1, but if certiorari is granted the issues to be resolved should include who has the burden of showing that particular sites would or would not reasonably become available. The entire burden should be on the cities.

B. Question No. 2: Long Term Leases

The Ninth Circuit correctly reversed the District

Court on the question of whether property encumbered by long term leases are available for adult businesses. Petitioner has referred to no circuit split on this issue. Petitioner implies, but does not expressly state, that the Fifth Circuit's decision in Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995) somehow conflicts with the decision of the Ninth Circuit below. This, however, is not true. To understand the Fifth Circuit's decision in the 1995 decision inWoodall v. City of El Paso one should look at its prior decision in Woodall v. City of El Paso, 950 F.2d 255 (5th Cir. 1992). In the earlier case, the Fifth Circuit stated, Woodall v. City of El Paso, 950 F.2d 255 at 262:

> "Appellants also complain that some property is currently in use. Renton responds, in part, to this contention. The fact that a business is operated on a particular parcel of property does not necessarily take the property out of the market place where adult businesses must fend for themselves. If, however, a business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any other business enterprise. Such a

> leasehold could legally bar appellants' use in the same manner as restrictive covenants or zoning prohibitions."

The passage quoted above certainly indicates that the Fifth Circuit believed that the property devoted to another use under a term of years would not be available for a relocation site for an adult business. The Fifth Circuit correctly noted in its Woodall opinion that this Court in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986) only responded "in part" to this contention.

The Ninth Circuit, in an earlier case involving adult zoning, Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1531 (9th Cir. 1993), cert.den. 511 U.S. 1030 (1994), referred to this language specifically. The Ninth Circuit in the Topnaga Press case quoted from the following portion of the Fifth Circuit's language from the Woodall case:

> "[When a] business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any other business enterprise." (Emphasis added).

Following the quote, the Ninth Circuit expressly stated,

> ". . . We need not determine whether the Fifth Circuit is correct. . . ."

Accordingly, the decision below by the Ninth Circuit is not inconsistent with its earlier decision in Topanga Press, Inc. v. City of Los Angeles, supra. The decision below clearly is not in conflict with the Woodall decision to which reference was made by the Ninth Circuit in its Topanga Press case.

The decision below does not conflict with the later decision of the Fifth Circuit in Woodall v. City of El Paso. The Fifth Circuit stated in the more recent Woodall v. City of El Paso case,

> "The Adult Businesses complained that some sites had existing structures that were unsuitable for any small retail business. In many cases these were large multi - tenant office - warehouse buildings, and the uncontroverted evidence was that the retail businesses could and occasionally did locate in such buildings. A few sites were occupied by rather large single use

building [sic] like a warehouse or factory, which could arguably be outside the commercial real estate market. The Adult Businesses also complained that some sites lacked adequate parking to meet the City's requirements of retail businesses, but made no attempt to show that any site's parking problem could not be cured at a reasonable cost. The Adult Businesses had other similar complaints about other sites. However, even if we agreed that these sites suffered from effects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable.

... In almost every case, if the suggested site proved physically or legally unavailable, there was another site next door or

> across the street that was also potentially available." Woodall v. City of El Paso, 49 F.3d at 1126. (Emphasis added)

It is clear from footnote 4 of Woodall v. City of El Paso, 49 F.3d at 1125-1126 (5th Cir. 1995), that there is no split between the Fifth Circuit and the Ninth Circuit's decision below. The Fifth Circuit stated,

> " . . . The record is devoid of evidence that any site was subject to a long term lease, much less one with such terms as would take it out of the commercial real estate market."

The Fifth Circuit did not hold that property encumbered by long term leases could be considered part of the relevant real estate market. The court did not focus on "long term" leases. Thus, there is no circuit split on this issue.

Having shown that there is no circuit split on the issue of what is part of the relevant market, we now turn to this Court's decision in City of Renton v. Playtime Theaters, supra, a case upon which Petitioner relies to demonstrate an alleged conflict between the decision of the Ninth Circuit below and this Court's decision in City of Renton v. Playtime Theaters, Inc.. This Court's prior decision in City of Renton v. Playtime Theaters is not on

point because that case involved an attempt by an adult business to enter the market for the first time. It did not involve a case such as the instant one where existing adult businesses were being forced to relocate by a later adopted ordinance. In the City of Renton v. Playtime Theaters case arguably it is the risk of the market place that the prospective adult business assumes when trying to enter the market. In other words, if the prospective adult business operator waited too long for a city to develop it is not the fault of the city that property which would otherwise have been available for adult uses became encumbered by long term leases. The prospective adult business operator simply could have come to the city earlier.

What the Petitioner fails to understand is that a new entry case is far different from a relocation case. When a city attempts to order or compel an existing adult business to relocate it should make sure that there are properties that are available, not tied up with long term leases. It is just not realistic to believe that if the only properties theoretically available under the zoning code of a particular city are tied up under long term leases that the properties are nevertheless available to the adult businesses which are being compelled to relocate. We cannot ignore reality nor we can ignore common sense. The cities know this. That is why cities play games with the Constitution, hoping that some court will be ignorant of the reality - that it is impractical to force an existing adult business to relocate when the only relocation site consists of an office building with long term professional tenants such as doctors or dentists. Would this Court in Young v. American Mini Theaters, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) have upheld the Detroit ordinance in question if it

required existing adult businesses to relocate to the General Motors plant. Would that have been realistic? Would any court uphold the constitutionality of such an ordinance?

Accordingly, this Court should decline certiorari with respect to Question No. 2. However, if it does grant certiorari with respect to Question No. 2, it should explore further that portion of the Ninth Circuit's decision purporting to uphold the contention that properties with restrictive covenants prohibiting adult businesses from being operated are nevertheless "available" for adult businesses. If property encumbered by a long term lease is not available, and it is not, as the Ninth Circuit correctly ruled, likewise properties encumbered by covenants prohibiting their being used by adult businesses should likewise be considered unavailable with respect to relocation cases. Whether or not they should also be considered unavailable for new entry cases is not relevant to this inquiry. Again, as with Question No. 1, if this Court should grant certiorari with respect to Question No. 2 the issue of restrictive covenants is fairly included within Question No. 2 with respect to long term leases.

C. Question No. 3: Sufficiency Of Alternative Sites

There is no circuit split on the issue of sufficiency of alternative sites in terms of their numbers. Certiorari should be denied on this point.

The instant case involves the forced relocation of at least five existing adult businesses. Respondents conceded in the trial court that there were eight properties that were theoretically available in that they were vacant and met the

zoning requirements. However, there was no indication that the owners of those properties would rent to Respondents. It is simply not sufficient from a real estate market perspective to believe that an adult business only needs one site to which it can relocate. There must be some opportunity to shop around for potential sites in terms of their suitability physically as well as economically.

Would Petitioner City of Long Beach contend that an adult ordinance requiring the only adult bookstore in town to move was constitutional if there was only one property available under the zoning code? What if the owner of that one parcel of property refused to sell or rent to the only adult bookstore for whatever reason - political pressure or otherwise. Clearly to have a viable choice the adult bookstore must have more than one property from which to select in order to make the relocation viable. Clearly the adult bookstore being compelled to relocate should not be at the mercy of one owner who may or may not choose to sell or rent to that particular business. While the failure or refusal to sell or to rent by the particular property owner would not be a constitutional violation still the City in terms of its zoning code must make available more than one property for the one adult business. There must be some choices available otherwise the relocation is realistically almost impossible.

In Young v. American Mimi Theaters, supra, this Court stated with respect to the issue of the number of possible locations for adult businesses:

> "The situation would be quite different if the ordinance had

> the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that '[t]he Ordinances do not affect the operation of existing establishments but only location of new ones. There are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight." Young v. American Mini Theaters, Inc., 427 U.S. 50, at 71-72, n35, 96 S.Ct. 21440, 2453 n35, 49 L.Ed.2d 310 (1976).

Existing adult businesses should not be forced to scramble for scraps of properties in inappropriate locations. We have come a long way from this Court's decision in Young v. American Mini Theaters, Inc.. It is time to stop the trend. In any event, Question No. 3 is not worthy of this Court's review. Indeed, the Ninth Circuit below expressed no opinion as to this particular issue and therefore this issue is not properly subject to certiorari review.

IV CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Honorable Court to deny certiorari.

Respectfully submitted,

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Counsel of Record
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(3)

Supreme Court, U.S.
FILED

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No. 00-814

In The

Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

SEUNG CHUN LIM, FLUFFY, INC., a California corporation, and 5436 SANTA MONICA BOULEVARD, INC., a California corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CALIFORNIA CITIES AND COUNTIES IN SUPPORT OF CITY OF LONG BEACH'S PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I. SUMMARY OF REASONS WHY REVIEW SHOULD BE GRANTED 1

A. Interests Presented by *Amicus Curiae* 1

B. The Decision of the Ninth Circuit Substantially Conflicts with Existing Law Governing Adult Business Zoning Regulations 2

II. THE COURT SHOULD GRANT CERTIORARI ON THE QUESTION OF WHICH PARTY BEARS THE BURDEN OF PROOF IN DETERMINING WHETHER AN ADULT BUSINESS ZONING ORDINANCE PROVIDES "REASONABLE ALTERNATIVE AVENUES OF COMMUNICATION" 7

A. The Ninth Circuit Erred by Confusing the Burdens Imposed on a Defendant Under the Three Separate Elements of the *Renton* Test 8

B. The Decision Imposes an Unfair and Unnecessary Burden on Public Entities 11

III. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S HOLDING THAT PROPERTIES SUBJECT TO "LONG-TERM" LEASES MAY NOT BE CONSIDERED IN DETERMINING WHETHER ZONING REGULATIONS LEAVE A REASONABLE NUMBER OF SITES 12

A. A Rule Disqualifying Sites Subject to Long-Term Leases Is Inconsistent with The Principles Established in *Renton* 13

B. The Presence or Absence of a Long-Term Lease Is Not a Reliable Indicator of the Actual Potential Availability of a Site 16

TABLE OF CONTENTS – Continued

Page

C. A Requirement for Considering Long-Term Leases Imposes Immense Practical Burdens on Public Entities Which Are Not Constitutionally Justified 17

IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

CASES

Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) 15

BBI Enterprises, Inc. v. City of Chicago, 874 F.Supp. 890 (N.D. Ill. 1995) 7

Ben Rich Trading, Inc. v. City of Vineland, 126 F.3d 155 (3rd Cir. 1997) 9

Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) 10

Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000) 4, 14

Buzzetti v. City of New York, 140 F.3d 134 (2nd Cir. 1998), *cert. denied*, 525 U.S. 816 6

City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) 9

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) ..... *passim*

David Vincent, Inc. v. Broward County, 200 F.3d 1325 (11th Cir. 2000) 8, 10, 15

Diamond v. City of Taft, 215 F.3d 1052 (9th Cir. 2000), *petition for cert. filed*, 69 USLW 3296 (Oct. 18, 2000) (No. 00-608) 4, 14

Grand Brittain v. City of Amarrillo, 27 F.3d 1068 (5th Cir. 1994) 15

Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994) 4, 15

TABLE OF AUTHORITIES – Continued

Page

J & B Entertainment v. City of Jackson, 152 F.3d 362 (5th Cir. 1998) 9, 11

Lim v. City of Long Beach, 12 F.Supp.2d 1050 (C.D. Cal. 1998) 6

Lim v. City of Long Beach, 217 F.3d 1050 (9th Cir. 2000), *petition for cert. filed* (Nov. 20, 2000) (No. 00-814) ..... *passim*

North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441 (7th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997) 6, 14

Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997), *cert. denied*, 522 U.S. 932 ..... 9, 11

T-Marc, Inc. v. Pinellas County, 804 F.Supp. 1500 (M.D. Fla. 1992) 8

Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994) 15, 16

United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) 9, 10

Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995), *cert. denied*, 516 U.S. 988 ..... *passim*

Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) 2, 3

STATUTES

42 U.S.C. § 1988 3

BRIEF AMICUS CURIAE OF CALIFORNIA CITIES AND COUNTIES IN SUPPORT OF CITY OF LONG BEACH'S PETITION FOR WRIT OF CERTIORARI

This *amicus curiae* brief is presented on behalf of 95 California cities, towns and counties (collectively "California Cities").[1] A full listing of the California Cities is attached hereto at Appendix A. California Cities respectfully request that the Court grant the petition for certiorari seeking review of the Ninth Circuit's decision in *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000), *petition for cert. filed* (Nov 20, 2000) (No. 00-814).

Pursuant to Rule 37.2(a) of the Rules of the Supreme Court, *amicus curiae* have obtained the consent of petitioner City of Long Beach and respondents Seung Chun Lim, *et al.*, to the filing of this amicus brief.

I. SUMMARY OF REASONS WHY REVIEW SHOULD BE GRANTED

A. Interests Presented by *Amicus Curiae*

Amicus curiae represent various cities, towns and counties ranging in size from large metropolitan areas to small residential communities throughout California. Many have had first hand experience with litigation initiated by the owners of sexually oriented ("adult") businesses. California Cities believe their interests and

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[1] Pursuant to Rule 37.6 of the Rules of the U.S. Supreme Court, this brief was authored solely by Fox & Sohagi and no person or entity other than *amicus curiae*, its members or its counsel provided a monetary contribution to the preparation or submission of this brief.

experiences in addressing the issues created by adult businesses are representative of those of municipal governments throughout the United States. Municipal governments have a strong interest in obtaining clear and consistent guidance from the courts on issues affecting the constitutionality of adult use ordinances. Municipal governments also have a strong interest in ensuring that standards by the Courts are not only clear, but capable of practical implementation by local governments seeking to balance the requirements of the First Amendment against the recognized adverse secondary effects of adult businesses.

B. The Decision of the Ninth Circuit Substantially Conflicts with Existing Law Governing Adult Business Zoning Regulations

This Honorable Court has twice addressed the subject of zoning ordinances which regulate the location of adult businesses, *i.e.* businesses which convey sexually explicit materials or forms of entertainment for a profit. In both instances, the Court recognized the "admittedly serious problems" created by adult businesses, and endorsed city efforts to protect residential and other sensitive uses from the adverse effects of such businesses, while still affording adult businesses a reasonable opportunity to operate. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (*"Renton"*); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (*"Young"*). The Court also twice observed that public entities "must be allowed a reasonable opportunity to experiment with

solutions to admittedly serious problems." *Renton*, 475 U.S. 41, 52; *Young*, 427 U.S. at 71.

In *Renton*, the Court established the basic analytical framework governing First Amendment challenges to adult business zoning regulations. The basic analysis includes an examination as to whether:

1. The ordinance is "content neutral," *i.e.* directed at public objectives unrelated to the suppression of expression (475 U.S. 41, 47-49);

2. The ordinance is "designed to serve a substantial governmental interest," and reasonably narrowly tailored for that purpose (475 U.S. 41, 50-53); and

3. The ordinance allows for "reasonable alternative avenues of communication" (475 U.S. 41, 53-54).

Notwithstanding *Renton* and *Young*, regulation of adult businesses remains a prolific source of litigation. The numerous cases cited in this brief represent only a small portion of the appellate court, district court and state court decisions on the subject. Quite simply, adult businesses have immense financial incentives to contest the validity of adult business zoning regulations. Such suits are often boosted by the possibility of recovering substantial attorneys' fees under 42 U.S.C. § 1988. Cities in turn have strong incentives to vigorously defend the constitutionality of their regulations. They do so, however, at the expense of diverting considerable municipal resources from other needed programs. Public entities therefore have a critical need for clear, consistent and practical guidelines governing the adoption and constitutionality of adult business zoning regulations.

Adult business litigation abounds over the issue of whether a jurisdiction's regulations leave open "reasonable alternative avenues of communication," *i.e.*, a sufficient number of potential adult business sites. *Renton*, 475 U.S. 41, 53-54. The problem is by no means confined to major cities, but also affects smaller communities who can ill afford expensive litigation. *See, e.g, Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000) [population of 32,000]; *Diamond v. City of Taft*, 215 F.3d 1052 (9th Cir. 2000), *petition for cert. filed* 69 USLW 3296 (Oct. 18, 2000) (No. 00-608) [population of 6,800].

The Ninth Circuit's decision in *Lim v. City of Long Beach*, 217 F.3d 1050, makes it considerably more complicated and exceedingly more difficult to ensure constitutionally sound regulatory provisions that safeguard the community from the serious deleterious secondary effects of adult businesses while still allowing for their operation. First, the decision holds that public entities bear the burden of proof on the question of whether the ordinance leaves open "adequate alternative means of communication." *Id.* at 1054. Amici believe this conclusion is legally incorrect for reasons elaborated in Section II below. While a public entity bears a limited burden of identifying a permissible basis for their adult business regulations under the first two elements of the *Renton* test, no court has previously held that a public entity bears the burden of proof on the third, basically factual, question of whether the ordinance leaves open an adequate number of sites. The Fifth Circuit in *Woodall v. City of El Paso*, 49 F.3d 1120, 1126 (5th Cir. 1995), *cert. denied*, 516 U.S. 988

concluded the opposite. This new requirement by the Ninth Circuit imposes a considerable additional practical burden on public entities both inside and outside the courtroom. Public entities apparently now must not only be prepared to make the entire record necessary to litigate alternative sites issues, but must anticipate being required to prevail by a preponderance of the evidence on every contested issue concerning the availability of each site. Challengers to adult business regulations, however, may trigger this burden by little more than filing a pleading alleging the inadequacy of the sites.

The *Lim* decision further compounds the difficulties facing public entities by holding that sites zoned for adult business use, but which are subject to "long-term" leases, cannot be considered part of the relevant real estate market. *Lim*, 217 F.3d at 1056. This holding is logically inconsistent with *Renton's* command that adult businesses "fend for themselves in the real estate market," and cannot complain if available properties are occupied by other uses through no fault of the government. 475 U.S. 41, 53-54. The decision also ignores the commercial reality that leases, long-term or short-term, often may be assigned, sublet or terminated, and therefore do not necessarily represent a bright-line barrier to acquisition by an adult business or any other commercial user. The practical problem posed by this holding is tremendous. Neither cities or counties have a reliable or economically practical way of determining which properties may be disqualified by reason of a long-term lease, either at the time of enactment of an ordinance, or in ensuing years.

Finally, the *Lim* decision conflicts with an emerging consensus among the circuit courts that an adult use

business regulation will be upheld if it is shown that the number of sites available to adult businesses substantially exceeds the number of adult businesses reasonably likely to require accommodation. *See Lim*, 217 F.3d at 1055-1056; cf. *Buzzetti v. City of New York*, 140 F.3d 134, 141 (2nd Cir. 1998), *cert. denied*, 525 U.S. 816; *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 444-445 (7th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997); *Woodall*, 49 F.3d 1120, 1126-1127. In *Lim*, Long Beach provided a non-exhaustive list, with supporting evidence, showing the existence of 115 potential sites. After a full evidentiary trial, the district court found that 109 of these were actually potentially available to adult businesses, and that only six adult businesses existed in Long Beach. *Lim v. City of Long Beach*, 12 F.Supp.2d 1050, 1066-1067 (C.D. Cal. 1998). The Ninth Circuit nevertheless reversed and remanded to allow the plaintiff to offer evidence that some of the 109 sites were subject to long-term leases or other impediments. *Lim*, 217 F.3d at 1056.

Taken as a whole, *Lim* leaves public entities completely uncertain of how they should allocate sufficient sites for adult businesses without compromising the goal of minimizing the serious secondary effects of such businesses, unless they are willing to fund detailed site-by-site evaluations of at least each property made available to adult businesses each time they enact or amend an adult business zoning ordinance. This duty, moreover, would be ongoing. Public entities will need to frequently update their individual site data, perhaps annually, to ensure that changes in lease status or other market conditions did not render individual sites arguably unavailable. California Cities respectfully submit that the

Constitution does not impose such a burden on jurisdictions attempting to balance in good faith the First Amendment rights of adult businesses and the legitimate demands of their citizens for protection from the conceded adverse secondary effects of these businesses.

California Cities offer below a more detailed critique of the legal errors and problems created by the *Lim* decision, with emphasis on the first two issues presented for review.

II. THE COURT SHOULD GRANT CERTIORARI ON THE QUESTION OF WHICH PARTY BEARS THE BURDEN OF PROOF IN DETERMINING WHETHER AN ADULT BUSINESS ZONING ORDINANCE PROVIDES "REASONABLE ALTERNATIVE AVENUES OF COMMUNICATION"

The first issue presented for review is which party – the plaintiff adult business operator or defendant public entity – bears the burden of proof on the third element of the *Renton* test, *i.e.* whether an adult business zoning ordinance provides "reasonable alternative avenues of communication." *Renton*, 475 U.S. 41, 53-54. In *Lim*, the Ninth Circuit held that the defendant public entity bears the burden of proof on this issue. *Lim*, 217 F.3d at 1054.

This Ninth Circuit decision conflicts with authority in other circuits. *See Woodall*, 49 F.3d 1120, 1126; *BBI Enterprises, Inc. v. City of Chicago*, 874 F.Supp. 890, 895 (N.D. Ill. 1995). Other courts have held that a public entity has only

the "burden" of identifying the areas and number of sites legally available under the ordinance, *i.e.* information which may be deduced from zoning and parcel maps. *T-Marc, Inc. v. Pinellas County*, 804 F.Supp. 1500, 1504 (M.D. Fla. 1992). The burden of proving that such sites are not reasonably available in fact, or are constitutionally inadequate in number, however, rests on the plaintiff. *Id.*

California Cities believe that the Ninth Circuit's ruling is legally insupportable. At bottom, the Ninth Circuit's opinion appears to rest on a misreading of prior precedents in this Court and other circuits, and a failure to properly distinguish among the discrete elements of the constitutional test established in *Renton*. The Ninth Circuit erred in *Lim* by failing to distinguish between the *burden of proof* in a courtroom, and the *burden of justification* which a public entity may bear in showing that the challenged regulations are "content neutral" and "designed to serve a substantial governmental interest." *See Renton*, 475 U.S. 41, 47 and 48-53. No court has previously found that a public entity defendant bears any burden of proof or justification on the third element of the *Renton* test, which is essentially a factual question. *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1333 (11th Cir. 2000).

A. The Ninth Circuit Erred by Confusing the Burdens Imposed on a Defendant Under the Three Separate Elements of the *Renton* Test

In *Renton*, 475 U.S. 41, this Court held that zoning regulations which restrict the permissible location of

adult businesses should be examined under the test generally applied to "time, place and manner" restrictions on speech. The essential elements of the constitutional test are whether the regulations are "content neutral," "designed to serve a substantial governmental interest," and "do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. 41, 47.

This Court and lower courts have found that public agencies do bear a certain *burden of justification* with respect to specific elements of the foregoing tests, specifically the first and second elements of the test identified in *Renton*, or the corresponding components of the four part *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367, 376-377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). To satisfy this "burden of justification," the government must make at least a minimal affirmative showing by (1) identifying a legitimate governmental purpose served by the challenged regulations unrelated to the suppression of speech, and (2) providing evidence that it "reasonably believed" the regulations would ameliorate the problem and were appropriately tailored to further the stated governmental purpose. *Renton*, 475 U.S. 41, 50-53; *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-173 and 178-179 (3rd Cir. 1997), *cert. denied*, 522 U.S. 932; *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155, 161-163 (3rd Cir. 1997); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 1395-1396, 146 L.Ed.2d 265 (2000) [applying similar criteria under *O'Brien* test]; *J & B Entertainment v. City of Jackson*, 152 F.3d 362, 371-375 (5th Cir. 1998).

No decision before *Lim*, however, has purported to extend this justification requirement to the third prong of the *Renton* test. *Renton*, 475 U.S. at 53-54. This is borne out

in the very authority cited in *Lim*, 217 F.3d at 1054 – the cited passages in these other circuit court opinions all address the first two elements of the *Renton* test or corresponding elements of the *O'Brien* test.

Lim also cites *Renton*, 475 U.S. at 50, as "implicitly placing the burden of proof on city." *Lim*, 217 F.3d at 1054. The cited portion of *Renton*, however, addresses the question of whether the city ordinance served a substantial governmental interest. *Renton* offers no suggestion as to which party bears the burden of proof on the issue of reasonable alternative avenues of communication. 475 U.S. at 53-54. *Lim* lastly cites *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). That case, however, involved postal regulations barring the unsolicited mailing of advertising for contraceptives, and did not involve any issue concerning the adequacy of alternative avenues of communication.

Aside from citation to inapt authority, the Ninth Circuit in *Lim* offers no particular justification for imposing the burden of proof on public entities where the question is the adequacy of the number or kind of sites left available for operation of adult businesses. California Cities believe there is no justification for such a holding. The question of whether an adequate number of sites are available for adult businesses is ultimately a factual one (*David Vincent*, 200 F.3d 1325, 1333), capable of being established by objective evidence. There is no special reason that the burden of proof should be shifted to the defendant on this question. The rule that governmental entities must make some threshold affirmative showing regarding the first two elements of the *Renton* test, is akin to a rule of necessity. As various courts have observed, in

the absence of such a threshold showing, the courts simply cannot evaluate whether the regulation was adopted for the impermissible purpose of restricting speech, nor can the court know what evidence the public entity "reasonably believed" to justify its conclusions that the challenged regulations were an appropriate means of addressing the problem. *Phillips*, 107 F.3d 164, 173-174; *J & B Entertainment*, 152 F.3d 362, 372-375.

B. The Decision Imposes an Unfair and Unnecessary Burden on Public Entities

The allocation of the burden of proof to defendants has tremendous practical implications. The first and most obvious of these implications is that, absent contrary direction from this Court, public entities may no longer rely on any presumption of constitutionality nor simply respond to specific allegations of deficiencies by the plaintiff. Public entities faced with litigation by adult business operators must instead prepare to prevail by a preponderance of the evidence on every contested issue concerning the availability of adequate "alternative means of communication."

There appears no good justification for transferring the burden of proof on this issue to public entities. The burden of proving legislative enactments unconstitutional is normally placed on a challenging party, and this requirement has not been found in other contexts to dilute the protections provided by the Constitution. While it has been said that government must afford some "breathing room" for the exercise of First Amendment

rights, breathing room afforded to adult businesses often comes at the expense of what this Court has recognized to be substantial adverse secondary effects on surrounding communities and neighboring citizens. *Renton,* 475 U.S. 41, 54. Moreover, the test of whether an entity's regulations afford adequate "alternative avenues of communication" comes only after the entity has established that its regulations are content neutral and narrowly tailored so as not to intentionally or unnecessarily suppress free expression. *Renton,* 475 U.S. 41, 47-53. The judicial policy which mandates heightened scrutiny of regulations affecting free expression is satisfied by these first two elements of the *Renton* test. Public entities can ill afford the additional burdens which would be imposed by the Ninth Circuit's holding that they bear the entire burden of proof in showing that their adult business zoning regulations leave available a satisfactory number of sites for adult businesses.

III. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S HOLDING THAT PROPERTIES SUBJECT TO "LONG-TERM" LEASES MAY NOT BE CONSIDERED IN DETERMINING WHETHER ZONING REGULATIONS LEAVE A REASONABLE NUMBER OF SITES

In the trial court proceedings, Long Beach identified a total of 115 specific sites available for adult businesses. *Lim,* 217 F.3d 1050, 1055. The Ninth Circuit nevertheless remanded to allow the plaintiff to offer evidence that some of these sites were encumbered by long term leases. The Ninth Circuit opined that such properties did not

have a "genuine possibility of coming available for commercial use," and therefore could not be deemed part of the "relevant commercial real estate market" for purposes of determining the number of available sites. *Id.* at 1055-1056. Implicitly this reasoning would also disqualify other sites encumbered by other long-term privately-created restrictions, such as restrictive covenants, over which the public entity has no control.

The rule adopted by the Ninth Circuit is problematic on several levels. First, it is inconsistent with principles stated in *Renton*, 475 U.S. 41, 53-54. Second, the rule lacks a genuine factual foundation. In the real commercial world, the existence of a long-term lease is not a reliable indicator of long-term availability or unavailability. Possession of leased property may be acquired by any number of means, including sublease, purchase, assignment, default, business failure or bankruptcy. Lastly, there is no practical, reasonable means for public entities to comply with the rule. In many cases it will be impossible to identify properties subject to long-term leases at the time of enactment of an adult use zoning regulation, and in all cases it would require an extraordinary and unwarranted investigative burden to identify all such relevant properties.

A. A Rule Disqualifying Sites Subject to Long-Term Leases Is Inconsistent with The Principles Established in *Renton*

This Court established the basic analytical framework for determining whether zoning regulations leave open "reasonable alternative avenues of communication"

in *Renton*, 475 U.S. 41, 53-54. The Court effectively dispensed with any notion that public entities are required to guarantee adult businesses the ability to operate. Rather, the obligation is merely to provide adult businesses a reasonable opportunity to compete with other commercial enterprises for space within it jurisdictional boundaries. The Court noted:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. . . . "

Id. at 54.

In the years since the *Renton* decision, it has become clear that the question of whether a zoning ordinance provides a "reasonable opportunity" for adult businesses to open and operate turns on the number of individual *sites* lawfully available under the ordinance, after factoring in relevant restrictions. *Lim*, 217 F.3d 1050, 1054; *Boss Capital*, 187 F.3d 1251, 1253-1254; *Diamond v. City of Taft*, 215 F.3d 1052, 1057-1058; *North Avenue Novelties*, 88 F.3d 441, 445; *Woodall*, 49 F.3d 1120, 1125. As dictated by *Renton*, there is universal agreement that purely economic factors, such as the cost of moving, purchasing, leasing, improving or refurbishing a legally available site, are irrelevant in determining whether a site is "available" for

adult businesses. *David Vincent*, 200 F.3d 1325, 1334; *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Holmberg*, 12 F.3d 140, 144; *Alexander v. City of Minneapolis*, 928 F.2d 278, 283 (8th Cir. 1991).

There is less clarity on what other factors may render a site unavailable. The two leading decisions which have emerged on the subject generally hold that the universe of sites deemed available for adult businesses must be defined in terms of the "relevant real estate market," which includes all sites which are potentially available for any normal commercial use. *Topanga Press*, 989 F.3d 1529-1530; *Woodall*, 47 F.3d 1120, 1124. However, whether a site within this market is "actually" available, as opposed to merely "potentially" available for other reasons is irrelevant for First Amendment purposes. *Topanga Press*, 47 F.3d at 1529, citing *Renton*, 475 U.S. 41, 53; *Woodall*, 49 F.3d at 1126. The fact that a site zoned for adult business use is already occupied by another business is irrelevant; this is simply an inevitable result of competition for space in the real estate market. *David Vincent*, 200 F.3d 1325, 1335; *Woodall*, 49 F.3d at 1125 [holding it irrelevant that a building site is "currently occupied or leased"]. It is also constitutionally irrelevant that the owners of existing sites may be reluctant to sell or lease to an adult business. *David Vincent*, 200 F.3d 1325, 1335; *Woodall*, 49 F.3d at 1125; *Alexander*, 928 F.2d 278, 283. The inquiry is simply whether *any* generic commercial business could be located on the site. *Topanga Press*, 989 F.2d at 1529-1532; *Woodall*, 47 F.3d 1120, 1124; *see Grand Brittain v. City of Amarrillo*, 27 F.3d 1068, 1069-1070 (5th

Cir. 1994). Only sites that cannot feasibly be used by any commercial enterprise are excluded. *Id.*

The foregoing core principles stated in *Topanga Press, Woodall* and subsequent cases are consistent with *Renton*. The problem presented here is the Ninth Circuit's attempt to hedge on these principles by disqualifying commercial sites subject to long-term leases. This is fundamentally inconsistent with *Renton's* requirement that adult businesses "must fend for themselves in the real estate market." *Renton*, 475 U.S. 41, 54. It is manifest that in any commercial real estate market, a substantial number of properties are likely to be under current lease obligations for varying terms. The fact that available sites are tied up by other uses is simply one of the market factors that adult businesses, like any other business, must address.

B. The Presence or Absence of a Long-Term Lease Is Not a Reliable Indicator of the Actual Potential Availability of a Site

Aside from being legally untenable, the long-term lease rule proffered in *Lim* rests on a fundamentally and demonstrably false factual premise, *i.e.* that a property subject to a long-term lease is necessarily unavailable for adult businesses. This premise ignores both the legal and factual reality of commercial leasing. An adult business operator may in fact acquire the right to operate on previously leased property through any number of mechanisms. First, the lease may be assignable. Alternately, the adult business may sublease all or a portion of the property. A lease may also provide for contingencies or options for early cancellation or abandonment which

would render the property available for rent or lease long before expiration of the full lease term. A lease may also be cancelled by mutual agreement of the lessor and lessee. Lastly, no lease guarantees the economic health of the leasing business. If the lessee becomes insolvent, declares bankruptcy or otherwise ceases operation, the lease is of little practical effect. The owner generally will be required to consent to an assignment, sublease or termination of lease in favor of new tenants.

Given the realities of commercial leasing, it is clear that no credence can be given to the premise that properties subject to long-term leases are necessarily unavailable for the short or long term. On a purely legal plane, there may be no constraint at all. The election to assign the lease, sublet or exercise other options provided by the lease may be purely an economic decision of the lessee or lessor. There is no sound basis for deeming leased properties excluded from the "relevant real estate market" by virtue of the current lease term.

C. A Requirement for Considering Long-Term Leases Imposes Immense Practical Burdens on Public Entities Which Are Not Constitutionally Justified

If allowed to stand, this aspect of the *Lim* decision will impose a substantial new burden on public entities to ascertain and monitor the lease status of all designated properties under its zoning ordinance. If a public entity fails to investigate and make allowance for the assumed unavailability of leased properties at the time it enacts an ordinance, its work may be subject to instant challenge,

with the prospect of awards of damages, attorneys' fees, other attendant costs and the inherent disruption of litigation. Moreover, the danger is not confined to the time of enactment, but continues throughout the duration of the ordinance, since the number of available sites may at any time be contracted by the leasing of additional properties, a market factor over which a public entity has no control.

To satisfy the standard established in *Lim*, public entities will need to engage in constant monitoring of real estate activity. As a practical matter, the burden is not only daunting, but likely impossible to satisfy. The granting of a long-term lease is a private market transaction and the parties are under no obligation to record the lease. The prospect of public entities combing public records or inquiring door-to-door to monitor leasing activity raises troubling questions regarding government intrusiveness and monitoring of private activity.

The foregoing problems are considerably aggravated if one takes into account the infinite variations in terms, durations and contingencies which may be found in individual leases. The *Lim* decision itself does not advise public entities of how "long-term" a lease must be to disqualify a property as a potential adult business site. Even assuming public entities may guess the correct standard, a public entity cannot fully evaluate how serious an impediment the lease is to actual potential adult business use without reviewing the terms of each lease individually. In the absence of some bright-line rule, public entities would be required to scrutinize and evaluate each lease individually, with regard to such terms as assignability, renewal, cancellation, and other contingencies.

Moreover, a final assessment of whether the lease truly renders the property unavailable for a full term cannot be made in the abstract, without some assessment of the economic viability of a lessee's business in the actual market place. Such assessments are not only impossible given the information likely to be available, but well beyond the expertise normally required of public decisionmakers.

It is no answer to say that such complex inquiries may be postponed until the time public entities' regulations are actually challenged in court. First, public entities should not be required to operate with such a sword of Damocles hanging over their heads. Uncertainty and unpredictability over the constitutionality of government regulations favors no one. Second, even assuming the burden is triggered only by the filing of the lawsuit, the burden is still too onerous. *Renton* and the body of case law following in its wake – did not contemplate that the constitutionality of adult zoning regulations would turn on debates among expert witnesses concerning the minutiae of individual lease terms affecting properties in the relevant commercial property market. The interests of all parties are best served by a bright-line rule which avoids microscopic examination of the leasehold status of every property zoned to be available for adult businesses. Such an inquiry is clearly inappropriate and unnecessary to determine whether adult businesses have been afforded an opportunity to compete on equal terms for space in the real estate market place. No more is constitutionally required. *Renton*, 475 U.S. 41, 53-54.

IV. CONCLUSION

California Cities recognize that reconciliation of the First Amendment and municipal zoning powers as they affect adult businesses requires a careful and well considered balancing of interests. The decision of the Ninth Circuit in *Lim*, 217 F.3d 1050, has decidedly upset the balance, imposing new and unwarranted burdens, and placing public entities throughout the country in greater uncertainty as to the law. Review should be granted by this Court to redress this error and clarify the law.

Respectfully submitted,

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APPENDIX A

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